

No. 88-6613-CSY
Status: GRANTED
CAPITAL CASE

Title: Richard Boyde, Petitioner
v.
California

Docketed:
February 7, 1989

Court: Supreme Court of California

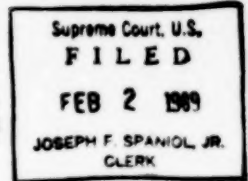
Counsel for petitioner: Fischer, Dennis A.

Counsel for respondent: Millar Jr., Frederick

Entry	Date	Note	Proceedings and Orders
1	Dec 30 1988	G	Application (A88-522) to extend the time to file a petition for a writ of certiorari from January 8, 1989 to February 7, 1989, submitted to Justice O'Connor.
2	Jan 4 1989		Application (A88-522) granted by Justice O'Connor extending the time to file until February 7, 1989.
3	Feb 7 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Mar 6 1989		Brief of respondent California in opposition filed.
6	Mar 16 1989		DISTRIBUTED. March 31, 1989
8	Jun 5 1989		Petition GRANTED. *****
10	Jun 26 1989		Order extending time to file brief of petitioner on the merits until August 7, 1989.
11	Jul 27 1989		Joint appendix filed.
12	Aug 7 1989		Brief amicus curiae of California Appellate Project filed.
14	Aug 7 1989		Lodging filed with amicus brief of California Appellate Project.
13	Aug 10 1989		Order further extending time to file brief of petitioner on the merits until August 11, 1989.
15	Aug 11 1989		Brief of petitioner Richard Boyde filed.
17	Sep 10 1989		Brief amici curiae of Arizona, Alabama, et al. filed.
16	Sep 12 1989		Brief of respondent California filed.
18	Sep 13 1989		Brief amicus curiae of Criminal Justice Legal Foundation filed.
19	Sep 26 1989		SET FOR ARGUMENT TUESDAY, NOVEMBER 28, 1989. (3RD CASE)
20	Sep 29 1989		CIRCULATED.
21	Sep 30 1989	D	Application (A89-250) to extend the time to file a reply brief from October 12, 1989 to October 26, 1989, submitted to Justice O'Connor.
22	Oct 3 1989		Application (A89-250) denied by Justice O'Connor.
23	Oct 12 1989	X	Reply brief of petitioner Richard Boyde filed.
24	Oct 27 1989	G	Motion of petitioner for appointment of counsel filed.
25	Oct 30 1989		DISTRIBUTED. Nov. 3, 1989. (Motion for appointment of counsel).
26	Nov 6 1989		Motion for appointment of counsel GRANTED and it is ordered that Dennis A. Fischer, Esquire, of Santa Monica, California, is appointed to serve as counsel for the petitioner in this case.
27	Nov 7 1989		Record filed. *
			Certified record from Supreme Court of California (2 boxes, including briefs, TR 34 Vols., Clerk's Trans. 4 Vols)
28	Nov 28 1989		ARGUED.

Grant
W2

88-6613



No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RICHARD BOYDE, Petitioner

v.

THE STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

1. Do the Eighth and Fourteenth Amendments permit a trial Judge to instruct a penalty phase jury that, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death," and does such instruction require reversal of the resulting capital sentence where the prosecutor repeatedly stressed to the jurors during both voir dire examination and penalty phase argument that they must impose a death sentence if aggravation preponderated by even "a slight outweigh" regardless of whether they personally found such sentence not otherwise warranted by the evidence, where there is every indication that the jury was misled by the erroneous view of its sentencing role and the scope of its discretion advanced in the prosecution's arguments?

2. Does a California capital sentencing proceeding accord with the principles expressed by this Court in Lockett v. Ohio, 438 U.S. 586 (1978), when it limits the sentencer's consideration of mitigating factors to those which extenuate the gravity of the crime, and fails to advise the jurors that defendant's character and record should be examined for compassionate factors which may reduce his individual culpability to the extent that a sentence less than death is the appropriate punishment?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RICHARD BOYDE, Petitioner

v.

THE STATE OF CALIFORNIA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

The petitioner Richard Boyde respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California, affirming petitioner's death sentence by a four to three vote. At issue in this case are two important and unresolved questions under the Eighth and Fourteenth Amendments concerning California's capital sentencing scheme, raised by limitations placed by the trial court's instructions and the prosecutor's misleading statements on the role and scope of the jury's determination whether petitioner should be sentenced to death or life imprisonment without parole.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of California are officially reported at 46 Cal.3d 212, and unofficially reported at 250 Cal.Rptr. 83 and 758 P.2d 25. The official report of the opinion is reproduced as Appendix A to this petition. The order denying petitioner's petition for rehearing is unreported and is attached as Appendix B.

JURISDICTION

The decision and judgment of the Supreme Court of California was filed on August 11, 1988, affirming petitioner's convictions for capital murder, kidnapping for robbery and robbery, and the resulting sentence of death imposed April 20,

1982. The California Supreme Court denied a timely petition for rehearing on November 9, 1988. On January 4, 1989, Justice O'Connor signed an order extending time for filing this petition for writ of certiorari to and including February 7, 1989. Also on January 4, 1989, the Supreme Court of California issued an order staying petitioner's execution pending final determination of this petition for writ of certiorari. Appendix C.

The jurisdiction of this Court is invoked under Title 28, United States Code section 1257, subdivision (3).

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

United States Constitution, Eighth and Fourteenth Amendments, and California Penal Code sections 190.2, 190.3 and 1259. See Appendix D for verbatim statement of these authorities.

STATEMENT OF THE CASE^{1/}

On September 28, 1981, petitioner and codefendant Carl Franklin Ellison (not a party herein) were charged by information filed in the Superior Court of the State of California in and for the County of Riverside (Case No. CR-18348) with the crimes of murder, robbery, and kidnapping for robbery. The offenses were committed on or about January 14, 1981. Two "special circumstances" -- murder during commission of a robbery and murder during the commission of kidnapping for robbery -- were alleged, thus making this a capital case. Cal. Penal Code, § 190.2, subdivisions (a)(17), paragraphs (i) and (ii). Petitioner was further charged with having suffered two prior felony convictions. He alone was additionally charged in the information with the commission of robbery and kidnapping for robbery, on January 5, 1981 (these further charges are not involved in the within petition). CT 1-6.

The instant offenses arose from the robbery of a convenience store in Riverside, California, after which the clerk of the store was taken to a nearby orange grove and fatally shot.

^{1/} The pertinent trial court proceedings are set out in the opinion below (Appendix A), and are concisely summarized below along with some additional matters from the reporter's transcript (hereafter "RT") and clerk's transcript (hereafter "CT").

Co-defendant Ellison waived a jury trial; he was tried by the same Judge who simultaneously presided over petitioner's jury trial in the consolidated proceeding. Both petitioner and co-defendant Ellison testified before the jury in their own defense. Each acknowledged participation in the robbery and kidnapping, but contended the other shot the victim. 46 Cal.3d at 222-223, 227-231.

Petitioner was convicted of all charges, as well as of the two special circumstances. The jury also made a special finding that petitioner "personally killed [the victim] with express malice aforethought and premeditation and deliberation." Ellison was convicted by the court of first degree murder and the allegations of special circumstances were found true. However, at the sentencing hearing the judge struck the special circumstances as to Ellison thereby subjecting him to a more lenient sentence of 25 years to life imprisonment. 46 Cal.3d at 221, 231.

In the penalty phase of petitioner's jury trial, the prosecution presented evidence of prior offenses by petitioner, of an unexecuted plan by him to escape from the county jail during the instant trial, and concerning other misdeeds; also certain police officers and petitioner's former probation officer testified about various contacts with him. The defense offered extensive testimony by petitioner's friends and family describing his deprived background and good qualities, and relating the unavailing efforts of petitioner's impoverished family to obtain counseling for his psychological problems. A psychologist testified petitioner has an inadequate personality, is often depressed and socially isolated, and has an intelligence level between borderline and dull-normal. 46 Cal.3d at 247-249.

At the conclusion of the penalty trial, the jurors were instructed that certain limited and specified matters could be considered as mitigating circumstances. Additionally, the court directed the jury to take into account: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CT 541-542. The jury was further advised that "the word 'extenuate' means to lessen the

seriousness of a crime as by giving an excuse." CT 543. However, the jurors were not instructed that they could consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); emphasis and footnote deleted.

The court further directed the penalty phase jury: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." CT 538. But, as is evident from the majority and dissenting opinions of the California Supreme Court, the jurors were not instructed that the weighing process was merely a means for determining whether, in their personal judgment, the death penalty was the appropriate punishment; nor did the court inform the jurors that they were not compelled to impose the death penalty unless, upon conducting that weighing process, they deemed death -- rather than life imprisonment without parole -- to be the appropriate penalty. People v. Boyde, 46 Cal.3d 212 (1988); cf. Id., 252-254 (maj. opn.) with 257-259, 265-266 (dis. opn.).

The jury thereafter returned its verdict fixing petitioner's punishment as death. The trial judge denied petitioner's statutory motion to reduce the penalty to life imprisonment without the possibility of parole and entered a judgment of death against him on April 20, 1982. RT 4903-4908.

On petitioner's automatic appeal to the Supreme Court of California, a majority of four justices (out of seven) upheld petitioner's death sentence. Speaking for the majority, Justice Panelli concluded "the jury was adequately informed that the manner in which it weighed mitigating versus aggravating circumstances was in its sole discretion and that it thereby determined whether death was appropriate." Boyde, supra, 46 Cal.3d at 255. The majority thus rejected petitioner's contention that the instructions misdirected the jury's exercise of the weighing process for considering the various mitigating and

aggravating circumstances in deciding the appropriate penalty to impose, which petitioner further maintained the prosecutor had exploited during argument to mislead the jurors. Moreover, the majority opined that the three dissenting justices' reliance on misleading statements by the prosecutor "before trial to unsworn jurors during individual voir dire," as establishing that the jury was misinformed of the nature and breadth of its sentencing task, reflected a "novel view, unsupported by any cited authority" 46 Cal.3d at 254. Cf. Id., 259-262, 265-266 (Arguelles, J., conc. and dis.).

The majority opinion of the Supreme Court of California acknowledged that additional errors occurred during the penalty phase of petitioner's trial, to wit:

1. The trial court erred in admitting most of the prosecutor's evidence concerning petitioner's commitment to the California Youth Authority, his poor performance on parole, his untruthfulness, his possession of stolen property, his possession of marijuana in jail, his assault on Ms. Deltzman and Ms. Smith, and his robbery of Edward Hall. 46 Cal.3d at 249-250.

2. The prosecutor erroneously argued to the jury lack of mitigation should be considered as additional aggravation. Id. at 255.

The majority further concluded, however, that each of these errors was nonprejudicial and therefore affirmed the judgment of death, although it did not explicitly address whether the combined effect of all the penalty phase errors prejudiced petitioner. Id. at 256.

PRESERVATION OF ISSUES

The issues concerning jury instructions at the penalty phase of petitioner's trial were raised in the appellate briefing and determined on the merits by the Supreme Court of California. In California, it is not necessary to object to an instruction at trial in order to preserve such issue for appellate review. Cal. Penal Code § 1259.

REASONS FOR GRANTING THE WRIT

PETITIONER'S CASE PRESENTS A COMPELLING VEHICLE FOR THIS COURT TO EXAMINE THE CALIFORNIA SUPREME COURT'S DETERMINATION THAT A TRIAL COURT DOES NOT COMMIT FEDERAL CONSTITUTIONAL ERROR IN INSTRUCTING A PENALTY PHASE JURY THAT IT SHALL IMPOSE A DEATH SENTENCE IF AGGRAVATION OUTWEIGHS MITIGATION, NOTWITHSTANDING EVERY INDICATION THAT THE JURY WAS MISLED BY THE ERRONEOUS VIEW OF ITS SENTENCING ROLE BY THE PROSECUTOR'S VOIR DIRE AND PENALTY PHASE ARGUMENT. THIS CASE PROVIDES A STRIKING EXAMPLE OF HOW PROSECUTORIAL INDOCTRINATION MAY EXPLOIT INSTRUCTIONS SEEMINGLY LIMITING THE SCOPE OF SENTENCING DISCRETION, THEREBY LEADING THE JURORS TO INCORRECTLY BELIEVE THAT SO MUCH AS THE SLIGHTEST PREPONDERANCE OF AGGRAVATION OVER MITIGATION MANDATES A DEATH SENTENCE EVEN IF THE JURORS BELIEVE THE EVIDENCE OTHERWISE CALLS FOR A LESSER PENALTY OF IMPRISONMENT

This Court's decisions have consistently emphasized that a capital sentencing scheme must be "sensible to the uniqueness of the individual." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); California v. Brown, 479 U.S. ___ [93 L.Ed.2d 934, 942] (1987) (conc. opn. of O'Connor, J.). This Court has therefore insisted that the penalty of death must reflect a process affording "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983); accord, Sumner v. Shuman, 483 U.S. ___ [97 L.Ed.2d 56, 64-66] (1987). Such is "constitutionally indispensable" for a reliable "determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 304-305 (1976) (plurality opn.). Moreover, "the capital sentencing decision must

be made in the context of 'contemporary values.'" Brown, supra, 93 L.Ed.2d at 953 (dis. opn. of Blackmun J.), quoting Gregg v. Georgia, 428 U.S. 153, 181 (1976) (opn. of Stewart, Powell and Stevens, JJ.). It should thereby "express the conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 519-520 (1968), footnote omitted; accord, Woodson, supra, 428 U.S. at 295.

Accordingly, this Court has unhesitatingly "invalidated procedural rules that tended to diminish the reliability of the [capital] sentencing determination." Beck v. Alabama, 447 U.S. 625, 638 (1980); accord, Gardner v. Florida, 430 U.S. 349 (1977). Jury instructions having such a tendency have been equally condemned because "[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Mills v. Maryland, 486 U.S. ___, __ [100 L.Ed.2d 384, 395] (1988), -quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opn.); accord, Hitchcock v. Dugger, 481 U.S. __ [95 L.Ed.2d 347] (1987). The same rule applies to misleading argument by the prosecutor. Caldwell v. Mississippi, 472 U.S. 320 (1985).

Based upon these considerations, the decisions of this Court have consistently invalidated state statutes prescribing mandatory death sentences as the very antithesis of individualized sentencing commanded by the Eighth and Fourteenth Amendments. Sumner v. Shuman, supra; Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam); Woodson v. North Carolina, supra. Mindful of these authorities, the present case raises the propriety of instructing petitioner's penalty phase jury in the following mandatory language:

"If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." CT 538 (former CALJIC No. 8.84.2), emphasis supplied.

This charge -- which tracks language in the last paragraph of California Penal Code section 190.3 -- has been recognized by the California Supreme Court to be potentially

misleading by reason of the foregoing constitutional requirements. People v. Brown, 40 Cal.3d 512, 538-545, 220 Cal.Rptr. 637, 709 P.2d 440 (1985), reversed on other grounds sub nom. California v. Brown, supra, 95 L.Ed.2d 934. As that court later succinctly explained in People v. Allen, 42 Cal.3d 1222, 233 Cal.Rptr. 849, 729 P.2d 115 (1986), the within instruction "could be understood to require a juror (I) to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal view as to the appropriate sentence, and then (II) to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe death is the appropriate sentence under all the circumstances" Id. at 1277, citing its prior Brown decision.^{2/} These two potential misconceptions raise distinct constitutional concerns under the Eighth and Fourteenth Amendments.

As to the first likely misconception, a reasonable juror may be thereby misled into believing aggravation preponderates when in fact it does not. In truth, it is virtually impossible for a capital defendant to demonstrate sufficient mitigation to overbalance the inescapable fact his crime inexcusably snuffed out the life of a fellow creature. As People v. Brown therefore recognized, "it would be rare indeed to find mitigating evidence which could redeem such an offender or excuse his conduct in the abstract." 40 Cal.3d at 542, n. 13. While a lay juror might readily conclude otherwise from the instruction, the Brown decision perceived that the statutory language does not contemplate mandatory death sentences whenever "the jury merely finds more bad than good about the defendant" Ibid.

^{2/} Similarly, in People v. Hamilton, 45 Cal.3d 351, 247 Cal.Rptr. 31, 753 P.2d 1109 (1988), the court explained that: "[A] juror might reasonably understand that language to define the penalty determination as 'simply a finding of facts' or 'a mere mechanical counting of factors on each side of an imaginary "scale."' We also believed [in Brown] that a juror might reasonably understand the language to require him to vote for death if he finds that the evidence in aggravation outweighs the evidence in mitigation -- even if he determines that death is not the appropriate penalty under all the circumstances." Id. at 370-371; citations omitted.

Instead, as Brown reasoned, "the statute requires at a minimum that he suffer the penalty of life imprisonment without parole. It permits the jury to decide only whether he should instead incur the law's single more severe penalty -- extinction of life itself." Ibid.

It is this insight that defines and limits the jury's true task. In fact capital-case jurors are not required -- in the words of the instruction given in the instant case -- to "impose a sentence of death" "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances" Instead, "the weighing of aggravating and mitigating circumstances must occur within the context of those two punishments; the balance is not between good and bad but between life and death. Therefore, to return a death judgment, the jury must be persuaded that the 'bad' evidence is so substantial in comparison with the 'good' that it warrants death instead of life without parole." Brown, supra, 40 Cal.3d at 542, n. 13. If the jury fails to understand this is the true test -- which was never articulated to petitioner's jury -- then a defendant's efforts to demonstrate mitigation in the face of "more bad than good" shown about him will invariably prove futile. Such manifestly raises a grave "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, supra, 438 U.S. 586, 605 (plur. opn.).

Indeed, to the extent the jurors entertain such a misunderstanding, imposition vel non of the death penalty will be "arbitrary and capricious" "by resting the penalty determination on the particular jury's willingness to act lawlessly." Woodson v. North Carolina, supra, 428 U.S. at 303. That is, if the jurors believe they are mandated to return a death verdict whenever the "bad" about a capital murder and the defendant convicted thereof outweighs the "good," then they can impose a lesser sentence only by disregarding that mandate.

Turning now to the second problem raised by the instruction, the jurors may find aggravation preponderates, and -- following the mandatory "shall" language of the instruction --

conclude they must therefore impose the penalty of death regardless of their personal opinion that a lesser penalty is appropriate under all the circumstances. People v. Hamilton, supra, 45 Cal.3d 351, 370-371. The jurors may thus seek to avoid their responsibility for choosing between life and death by taking refuge in what the law supposedly says they "shall" do, thereby contravening the principle espoused recently in Caldwell v. Mississippi, supra, 472 U.S. 320, that the shifting of the sentencer's awesome responsibility to determine the sentence appropriate for a given defendant is "fundamentally incompatible with the Eighth Amendment's heightened need for reliability, in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305." Id. at 340.

For such reasons, the California Supreme Court has directed that the instruction here in issue (former CALJIC No. 8.84.2) not be used again, People v. Brown, supra, 40 Cal.3d at 545, n. 17, and it has formulated a new instruction to replace the offending language. Id. at 545, n. 19.^{3/} However, it remains a disturbing fact that the Supreme Court of California does not consider the giving of the former instruction to be error. People v. Allen, supra, 42 Cal.3d 1222, 1279, n. 38.

A justice of this Court has recently recognized that

^{3/} The differences between the pertinent portions of the old and new instruction are dramatic, emphasizing the seriousness of the deficiencies in the instruction given petitioner's jury:

Charge to Petitioner's Jury	Charge as corrected by <u>Brown</u>
"If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death	"In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

the asserted propriety of this instructional language appear be at odds with the Supreme Court's capital punishment jurisprudence and, recognizing the importance of the problem, urged that the entire court review the question. Hamilton v. California (No. 88-5746, Jan. 23, 1989) __ U.S. __ [57 U.S.L.W. 3485] (Marshall J., dissenting from denial of certiorari). For several reasons, however, petitioner's case offers a particularly compelling context for resolution of this important issue.

As Justice Marshall observed, in Hamilton the jurors were told "that they must be convinced beyond a reasonable doubt that the aggravating factors prevailed in order to impose the death penalty." Ibid. While Justice Marshall was surely correct in observing that further instruction on the burden of proof did not reach the crux of the error, some justices of this Court may have felt its presence -- explicitly noted by the California Supreme Court's decision in People v. Hamilton, 45 Cal.3d at 371 -- somewhat clouded the issue, or even that it cured any harm. Petitioner's case presents the matter far more cleanly. No such "reasonable doubt" advisement was given his jury.

Rather, in sharp contrast with Hamilton, petitioner's prosecutor argued to the jury at the close of the penalty phase:

"There is no requirement here that the aggravating be beyond a reasonable doubt over the mitigating before you can return the death penalty. It is merely a question of weighing." RT 4767; emphasis added.

Moreover, the prosecutor's explanation of that "weighing" process suggested an unduly narrow focus on the jury's part, when he argued:

"If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." Ibid.; emphasis added.

Beside these significant differences from Hamilton, other factors also make the instant case an especially appropriate one for review of this fundamental question. For one thing, the extremely close 4 to 3 vote -- at that point, the sharpest division on any appeal of a death judgment decided by California's high court as presently constituted -- suggests

there may be considerable uncertainty and perhaps some confusion among its justices as to the nature and scope of the constitutional deficiencies in the instruction.^{4/} To repeat, California's Supreme Court has yet to recognize that giving the instruction in question constitutes penalty phase error. Moreover, there should be little doubt that in the present case any such error was prejudicial.

Indeed, while maintaining the within instruction was correct, the State did not contest petitioner's position that if the instruction was erroneous petitioner had been prejudiced and was therefore entitled to a new sentencing proceeding. See 46 Cal.3d at 266, n. 6 (conc. and dis. opn. of Arguelles, J.). The majority's contrary conclusion thus accepted a position that the California Attorney General -- whose vigorous and resourceful advocacy in capital cases is well known to this Court -- seemingly did not even consider arguable. This circumstance by itself casts strong suspicion on the correctness of the decision below.

This case also demonstrates the great potential for abuse by prosecutorial argument inherent in instructions such as that at issue herein. It affords this Court an opportunity to make clear that in assessing the prejudicial effect of erroneous instructions, the entire record of the defendant's trial -- including the jury voir dire -- must be reviewed. One justice of this Court has already opined that potentially misleading instructions and prosecutorial penalty phase argument should be considered in assessing whether the jury was misled as to its penalty phase task. California v. Brown, supra, 93 L.Ed.2d 934, 943 (conc. opn. of O'Connor, J.).

^{4/} The problem is manifestly troublesome. Very recently, the Supreme Court of California has twice again split 4 to 3 on whether to reverse a death sentence based on the essentially the same problem as confronted the court in the present case. People v. Edelbacher, (S004527, Jan. 23, 1989) 47 Cal.3d __; People v. Farmer (S004489, Jan. 12, 1989) 47 Cal.3d __. In Edelbacher and Farmer, however, the slender majority decided in the defendant's favor. Of the seven justices on the court, only the Chief Justice has voted to affirm the death judgment in each of the three cases, and only Justices Mosk and Broussard have voted in each of these instances to remand for a new sentencing proceeding.

For reasons it less than fully articulated, the majority below took the position that only comments by the prosecutor made during penalty phase argument could be considered as exacerbating the misleading effect of the instruction; in particular the Boyde opinion holds that the prosecutor's voir dire of jurors who actually served on the sentencing jury could not be examined for that purpose. 46 Cal.3d at 254. More specifically, as emphasized by Justice Arguelles's dissent, the majority's position seems to be that voir dire may be considered only to the extent it "cures" the instructional problem -- but not to the extent it establishes reversible error. Thus Justice Arguelles observed that the court had previously found voir dire remarks curative in People v. Allen, supra, 42 Cal.3d 1222, 1279-1280. 46 Cal.3d at 260, n. 1 (conc. and dis. opn. of Arguelles, J.). Indeed, within days after deciding petitioner's case the court again resorted to and utilized jury voir dire for such curative purposes. People v. Brown, 46 Cal.3d 432, 453, n. 9, 250 Cal.Rptr. 604, 758 P.2d 1135 (1988).

Since the prejudicial effect of counsel's indoctrinating the jurors during voir dire examination has been often recognized by decisions of the California Supreme Court in other contexts, e.g., People v. Williams, 29 Cal.3d 392, 408, 174 Cal.Rptr. 312, 628 P.2d 869 (1981), and is well established by empirical evidence, Broader, Voire Dire Examinations: An Empirical Study, 38 So. Cal. L.Rev. 521, 522 (1965), the majority's position is difficult to defend even under California decisional analysis. Moreover, only this year a federal court sitting en banc took specific note of the prejudicial impact of misleading statements during voir dire, and reversed a death sentence because of prosecutorial misinformation imparted to the jury during both voir dire and closing argument. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). Furthermore, this Court has recently granted review in a case presenting a similar problem. Dugger v. Adams, (87-121, cert. granted Mar. 7, 1988) __ U.S. __ [99 L.Ed.2d 267].^{5/}

^{5/} Adams apparently presents the question whether remarks

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Limiting review of asserted penalty phase error to only certain parts of the record seems clearly inconsistent with the heightened scrutiny this Court has uniformly demanded in capital cases. Mills v. Maryland, supra, 100 L.Ed.2d 384, 399, and cases therein cited. Petitioner's case presents with sharp clarity the untoward consequences of disregarding plainly relevant indicia of prejudice merely because they are in a part of the record not routinely examined for such purposes. While the majority below chooses to treat the voir dire as factually and legally inconsequential, clearly the jurors could not have been so oblivious to the prosecutor's efforts.

Consider the following brief examples of indoctrinary admonitions by the prosecutor to members of the venire who actually served on petitioner's penalty phase jury:

(To Edward Armas, who became foreperson of the jury)
"And I believe it is quite possible that you, personally, if you were writing on a blank slate or writing the law yourself would, in a particular case, not think the death penalty appropriate, but yet the law says that it is." RT 1159.

(To Juror Towanda David)
"All you are doing is, it is not so much you personally are voting for death, you are viewing the law as I apply it here points inevitably to death, do you understand that?" RT 162.
(Ms. David answered, "Yes." RT 163.)

Another juror, Joan Breeding, responded to a similar lecture from the prosecutor during voir dire by acknowledging she understood that whether or not to impose the death penalty "isn't based on where I think it is appropriate."^{6/}

These remarks plainly urged the jurors not to exercise their personal judgment in determining whether the death penalty

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made by the judge to the advisory jury during voir dire examination misled the jurors as to their responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Adams v. Mainwright, 804 F.2d 1526 (11th Cir. 1986).

^{6/} At least six of the twelve penalty phase jurors were subjected to similar manifestly misleading indoctrination. The remaining three are: Donna Ash (RT 1976-1977), Alice Dall (RT 1740), and Gerald Hart (RT 1827). See also the more extended examples set out in the dissenting opinion below. 46 Cal.3d at 260-262, ns. 2-3 (conc. and dis. opn. of Arguelles, J.).

was appropriate under the circumstances, in derogation of this Court's holding in Caldwell v. Mississippi, supra, 472 U.S. 320; they left the jurors no latitude to "express the conscience of the community on the ultimate question of life or death," Witherspoon v. Illinois, 391 U.S. 510, 519-520 (1968), footnote omitted. Nevertheless, the Supreme Court of California unjustifiably refused to consider this portion of the record from petitioner's trial, making only the puzzling comment in passing that the prosecutor's remarks had been "magnified" by the dissent." 46 Cal.3d at 254, n. 6. It would be more accurate to recognize, however, that those remarks were magnified by the mandatory instructional language which reasonable jurors could readily construe as endorsing the prosecutor's erroneous but uncorrected viewpoint.

The limited and grudging approach by the Boyde majority to this serious concern as to misleading voir dire may reflect a misunderstanding by some justices of the Supreme Court of California as to the proper scope of review of death judgments established in the jurisprudence of this Court's past decisions. Because of the particularly close scrutiny constitutionally required for capital sentencing decisions, Mills v. Maryland, supra, 100 L.Ed.2d 384, 399, "in death cases doubts such as those presented here should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948). The California court's evident failure to accurately appreciate and apply that basic principle affords yet another compelling reason to grant review of petitioner's case.

THE CAPITAL SENTENCING PROCEEDING IN PETITIONER'S CASE FAILED TO ACCORD WITH THE PRINCIPLES EXPRESSED IN LOCKETT V. OHIO 438 U.S. 586 (1978) AND SIMILAR DECISIONS BECAUSE PETITIONER'S JURY WAS DIRECTED TO CONSIDER MITIGATING EVIDENCE PROFFERED BY THE DEFENDANT ONLY TO THE EXTENT THAT IT REDUCED THE GRAVITY OF THE CRIME, AND THE JURORS WERE NOT INSTRUCTED THAT SUCH EVIDENCE SHOULD BE EXAMINED FOR COMPASSIONATE FACTORS THAT MIGHT JUSTIFY A SENTENCE LESS THAN DEATH AS THE APPROPRIATE PUNISHMENT FOR PETITIONER'S INDIVIDUAL CULPABILITY

In conformity with subdivisions (a) through (k) of California Penal Code section 190.3, the jurors deciding whether petitioner should be sentenced to death or to life without possibility of parole were instructed they could consider a limited number of specific aggravating and mitigating factors. A concluding factor -- stated in subdivision (k) of both the statute and the instruction -- is broader: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CT 541-542.

As noted by Justice O'Connor's concurring opinion in California v. Brown, supra, 479 U.S. ___, ___, [93 L.Ed.2d 934, 943], in light of the limited scope of the other factors a California jury is allowed to consider, it appears that section 190.3 and the instruction which tracks it can pass constitutional muster only if they conform with this Court's recognition that a sentencing jury must "not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis omitted.) Lockett v. Ohio, supra, 438 U.S. 586, 604 (plurality opinion); Eddings v. Oklahoma, supra, 455 U.S. 104, 110. The Supreme of California so recognized in People v. Easley, 34

Cal.3d 858, 196 Cal.Rptr. 309, 671 P.2d 813 (1983); however, the court did not determine whether the instruction was prejudicial error because other considerations mandated reversal of Easley's death sentence. Id. at 877-879.^{7/} Subsequently, the court has indicated that it does not consider the instruction it disapproved in Easley to be erroneous. People v. Brown, 45 Cal.3d 1247, 1255-1256, 248 Cal.Rptr. 817, 756 P.2d 204 (1988).

Petitioner's case offers a singularly compelling vehicle to resolve the question whether the "factor (k)" instruction accords with the constitutional principles announced by this Court in Lockett and Eddings. The Supreme Court of California found that this instruction could not have misled petitioner's jury because "[a]ll of the defense evidence at the penalty phase related to Boyde's background and character" and "[d]efense counsel argued at length for giving great weight to" such evidence. 46 Cal.3d at 251. Petitioner submits, however, that advising a jury only that it may consider such of the defendant's evidence as "extenuates the gravity of the crime" clearly fails to satisfy constitutional standards. Moreover, the limited scope of the evidence the jury could take into account under that instruction was emphasized by the further advisement that "The word 'extenuate' means to lessen the seriousness of a crime as by giving an excuse." CT 543; emphasis added.

Initially, such an instruction on its face seemingly violates Lockett and Eddings because it limits the jury's consideration of evidence proffered by a defendant to that which lessens "the gravity of the crime." Such an advisement improperly narrows the jury's inquiry by focusing on the crime's "gravity" to the exclusion of the defendant's individual culpability. As Justice O'Connor recently explained in California v. Brown, supra: "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society,

^{7/} The court in Easley did suggest the instruction be modified "to avoid potential misunderstanding in the future" Id. at 878, n. 10. This modification came years too late to benefit petitioner and many other capital defendants whose appeals await decision by the California high court.

that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." 93 L.Ed.2d at 942, emphasis added (conc. opn. of O'Connor, J.).

The distinction between the gravity of a crime and an individual's culpability for that crime is plain. To take an extreme example, a defendant who has committed a crime of greatest imaginable gravity may nonetheless not be culpable for it because he was insane at the time he committed it. Since a jury focuses heavily on the circumstances of the crime in making its penalty determination -- and that crime is necessarily particularly reprehensible if it carries a potential death sentence -- instructions which refer solely to considerations that might "extenuate the gravity" of such crime, without further clarification that compassion-related factors might also justify a sentence less severe than death, are especially likely to mislead jurors as to the nature and scope of their solemn task.

In resolving whether "the instruction interferes with the jury's consideration of mitigating evidence[]" "[t]he question . . . is . . . what a reasonable juror could have understood the charge as meaning." [Citation.] "California v. Brown, supra, 93 L.Ed.2d 934, 940, quoting Francis v. Franklin, 471 U.S. 307, 315-316 (1985). "To determine how a reasonable juror could interpret an instruction, we 'must focus initially on the specific language challenged.'" Brown, supra, citing Francis, at 315. As shown above, the specific language challenged herein was facially incorrect and was accordingly especially likely to mislead the sentencer. Moreover, "review [of] the instructions as a whole," ibid., does not cure the problem since no other portions of the charge were concerned with defining aggravating and mitigating circumstances. What is more -- as explained in the preceding argument -- the instruction to the jury on how to use the aggravating and mitigating factors was itself gravely misleading. Far from curing the "factor (k)" problem, the mandatory language of the court's other erroneous instruction instead exacerbated it.

The decision's speculation herein that the jury could not have believed it should give no weight to the lengthy background and character evidence because such matters were presented by the defense, 46 Cal.3d at 251, misses the mark for several reasons. To begin with, it assumes the jurors "read between the lines" rather than followed their instructions literally. Yet jurors are generally strangers to the legal system, and may well approach the court's instructions with a determination to follow them in a literal, "our's not to reason why" manner. Indeed, the dissenting justices below noted that the prosecutor repeatedly urged the jurors to approach the penalty issue in a legalistic and impersonal way. 46 Cal.3d at 262 (conc. and dis. opn. of Arguelles, J.).

Furthermore, contrary to the majority's seeming belief in this case (and many other recent California capital decisions), the instruction's dangers are not limited to leading the jurors to vote for death based on a simple finding of facts or "a mere mechanical counting of factors on each side of an imaginary 'scale,'" Hamilton, supra, 45 Cal.3d at 370, quoting Brown, 40 Cal.3d at 540-541. Reasonable jurors might instead construe the court's charge as giving them rules under which they must determine whether petitioner's evidence was relevant. Even if jurors could resist the instruction's temptation to pretend they had never heard the evidence presented by the defense in mitigation (if, as the instruction seemingly permitted, they chose to do so), the real prospect that they would understand that such evidence was entitled to no mitigating weight because it did not lessen "the gravity of the crime" was still present.

Put somewhat differently, there is a serious danger that petitioner's jury was misled as to the nature of its penalty phase task. The jurors may have understood they could consider such evidence, but concluded in accordance with the instruction that evidence in mitigation did not weigh in favor of sparing petitioner's life -- although shown to their satisfaction -- unless it lessened the seriousness or gravity of the crime. For constitutional purposes this is too narrow a view. Irrespective

of whether it did or did "not relate specifically to petitioner's culpability for the crime he committed," petitioner's background and character were entitled to consideration on the question whether he deserved mercy -- the alternative and minimum punishment being a life term without possibility of parole -- "as a basis for a sentence less than death." See, Skipper v. South Carolina, 476 U.S. 1, 4 (1986).

When the incorrect instruction is "considered in combination with the prosecutor's closing argument," California v. Brown, supra, 93 L.Ed.2d at 943 (conc. opn. of O'Connor, J.), the likelihood the jurors were misled in the manner suggested above reaches near certainty. Consider, for example, how it enabled the prosecutor at petitioner's trial to argue, "if you look and you read what it says about extenuation, it says, 'To lessen the seriousness of the crime as by giving an excuse.' Nothing I have heard lessens the seriousness of this crime, nothing." RT 4824.^{8/} There appears no rational basis on which the jurors could have divined their obligation to consider "compassionate or mitigating factors stemming from the diverse frailties of humankind," Woodson v. North Carolina, supra, 428 U.S. 280, 304 (plurality opn.), or "relevant mitigating circumstances pertaining to the offense and a range of factors about [petitioner] as an individual," Sumner v. Shuman, supra, 97

^{8/} The majority opinion below dismissed the impact of such comments in the following manner: "Although the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence should not be considered." 46 Cal.3d at 251; emphasis added. It appears the court failed to fully appreciate the thrust of the prosecutor's remarks, which also included the following:

"[Y]ou are asked to consider whether what you have heard about this Defendant extenuates in any way the gravity of this crime, and I would suggest it does not." RT 4777.

"[N]othing that I have heard here relieves or extenuates in any way the seriousness of this particular crime." Ibid.

"Now I ask you, does this in any way relieve him or does that in any way suggest that this crime is less serious or that the gravity of the crime is any less; I don't think so." RT 4778.

L.Ed.2d 56, 64. Only counsel for the defense urged the jurors that such considerations were proper; his plea stood small chance against the prosecutor's argument to the contrary based on and verified by the court's erroneous charge. See, Carter v. Kentucky, 450 U.S. 288, 304 (1981); Taylor v. Kentucky, 436 U.S. 478, 488-489 (1978).

This Court has repeatedly emphasized that when there is a "substantial possibility that the jury may have rested its verdict on" a mistaken basis a new sentencing proceeding is required. Mills, supra, 100 L.Ed.2d at 395-396. It seems abundantly clear that petitioner's jury was incorrectly charged; and, as recently noted in Mills, "While juries indeed may be capable of understanding the issue posed in capital-sentencing proceedings, they must first be properly instructed." Id. at 396, n. 10. Here, a critical instruction was deficient in failing to advise the jurors that petitioner's character and background might establish diminished moral culpability; moreover, the prosecutor exploited that error in urging the jury to condemn petitioner to death. The California Supreme Court clearly erred in refusing to recognize this fundamental error and its prejudicial consequences.

Petitioner's case therefore presents a particularly compelling record on which this Court can not only clarify the scope of its past decisions in Lockett and Eddings, but also explicate more clearly the proper approach to assessing the impact of deficient penalty phase instructions and prosecution argument building on such deficiencies. The inadequacy of the California court's review of petitioner's death sentencing proceeding graphically illustrates the need for such resolution and guidance from this Court.

CONCLUSION

The Supreme Court of California's opinion's reflects a failure to appreciate the serious deficiencies under the Eighth and Fourteenth Amendments of penalty phase instructions limiting the jurors' consideration of a capital defendant's evidence in mitigation, and requiring them to mechanically impose a death

sentence if aggravation outweighs mitigation -- even if the jurors do not personally believe that death rather than life without parole is the appropriate punishment. The lower court decision and its treatment of penalty phase instructional error also represents a grudging approach to review of death judgments incompatible with this Court's past decisions and their underlying constitutional foundation.

For all the reasons stated herein, petitioner respectfully prays for issuance of a writ of certiorari to review these important questions.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of California
(47 Cal.3d 212)

[No. S004447, Crim. No. 22584, Aug. 11, 1988.]

THE PEOPLE, Plaintiff and Respondent, v.
RICHARD BOYDE, Defendant and Appellant.

SUMMARY

Defendant was convicted of robbery and kidnapping for robbery and found to have personally used a knife in perpetrating these offenses upon a gas station attendant (Pen. Code, §§ 211, 298, subd. (b), 12022, subd. (b)). He was also convicted of robbery, kidnapping for robbery, and first degree murder of a convenience store clerk (Pen. Code, §§ 211, 209, 189). The jury found two special circumstances true: murder during the commission of robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), and murder during the commission of kidnapping (Pen. Code, § 190.2, subd. (a)(17)(ii)). It also found that defendant personally used a firearm in perpetrating all three offenses (Pen. Code, § 12022.5) and specially found that defendant personally killed the victim with express malice aforethought, and premeditation and deliberation. The penalty was fixed at death. (Superior Court of Riverside County, No. Cr-18348, Robert K. Garst, Judge.)

The Supreme Court affirmed. It held that the trial court did not err in refusing to order separate trials for defendant and his codefendant, who was charged along with defendant with the convenience store offenses and who waived a jury trial. The court also held that the prosecution did not deny defendant due process in failing to disclose a secret agreement between it and the codefendant, since there was no direct evidence of the existence of such an agreement. Further, the court held, a police detective's conduct in interrogating defendant as to the gas station offenses and in informing him that he could not promise leniency but only pass information along to the district attorney, who had the authority to make such an offer, did not amount to an implied promise of leniency if defendant would give information regarding the convenience store offenses. Similarly, a statement by a police detective that he believed defendant was more involved in the convenience store offenses than he was admitting did not amount to an illegal inducement rendering involuntary defendant's subsequent admission to his participation in those offenses. The trial court did not prejudicially err in failing to instruct the jury that it could not find the felony-murder special circumstance true unless it found that defendant intended to kill at the time

of the homicide, and the improper admission of evidence in the penalty phase that did not relate to a prior felony conviction or criminal activity involving force or violence was harmless.

Finally, the court held, the trial court did not err in admitting evidence of defendant's plan to escape from jail during trial, and it did not mislead the jury by instructing it that if it concluded that the aggravating circumstances outweighed the mitigating ones, it must impose a sentence of death. (Opinion by Panelli, J., with Lucas, C. J., Eagleson and Kaufman, JJ., concurring. Separate concurring and dissenting opinion by Arguelles, J., with Mosk and Broussard, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

- (1a, 1b) **Criminal Law § 204—Separate Trials of Defendants Jointly Accused—Discretion of Court—Where One Defendant Waives Jury Trial.**—In a prosecution for robbery, kidnapping, and murder in which one defendant chose to waive jury trial, the trial court did not abuse its discretion in refusing to order separate trials for the two defendants, and such refusal did not deny a fair trial to the nonwaiving defendant. Although each defendant claimed the other was the killer, it was undisputed that each participated in the incident leading to death. No evidence inadmissible as to the nonwaiving defendant was introduced as a result of the joint trial, and the refusal to sever did not appear to have caused unfair prejudice to him.
- (2) **Criminal Law § 204—Separate Trials of Defendants Jointly Accused—Discretion of Court.**—By enacting Pen. Code, § 1098, the Legislature has expressed a preference for joint trials. The statute nevertheless permits the trial court to order separate trials, and the decision to do so is one largely within the discretion of the trial court. Whether denial of a motion to sever constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion to sever.
- (3) **Criminal Law § 205—Separate Trials of Defendants Jointly Accused—Grounds.**—A severance of trials of defendants jointly accused is justified: where there is an extrajudicial statement made by one defendant that incriminates another defendant and that cannot adequately be edited to excise the incriminating portions; where there

may be prejudicial association with codefendants; where there may be likely confusion from evidence on multiple counts; where there may be conflicting defenses; and where there is a possibility that in a separate trial the codefendant may give exonerating testimony.

[See Cal.Jur.3d (Rev), Criminal Law, § 2885; Am.Jur.2d, Trial, § 20.]

- (4a, 4b) **Criminal Law § 148.2—Discovery—Agreement Between Prosecution and Codefendant.**—In a prosecution for robbery, kidnapping, and murder, the prosecution did not fail to disclose a secret agreement between it and one defendant, who chose to waive jury trial and who testified in his own defense, such as would deny the other, nonwaiving defendant due process of law, where the record contained no direct evidence or admission of the existence of such an agreement but did contain express denials. The fact that the waiving defendant later successfully moved to have his conviction reduced to second degree murder and that the district attorney at that time agreed that the reduction would be appropriate was not determinative, since the district attorney's position as to the relative culpability of the codefendants remained consistent.
- (5) **Criminal Law § 148.2—Discovery—Evidence Relating to Credibility of Witness.**—The duty on the part of the prosecution to disclose all substantial material evidence favorable to an accused extends to disclosure of evidence that relates to the credibility of a material witness, and the suppression of substantial material evidence bearing on the credibility of a key prosecution witness constitutes a denial of due process within the meaning of U.S. Const., 14th Amend.
- (6) **Criminal Law § 367—Evidence—Admissibility—Confessions—People's Burden of Showing Voluntariness.**—The use in a criminal prosecution of an involuntary confession constitutes a denial of due process of law under both the federal and state Constitutions. In California, before a confession can be used against a defendant, the prosecution has the burden of proving that it was voluntary and was not the result of any form of compulsion or promise of reward. The proof must establish voluntariness beyond a reasonable doubt. At the trial level, the determination is made by the trial court outside the presence of the jury. The appellate court must examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was properly found. With respect to conflicting testimony, the appellate court accepts that version of the facts most favorable to the finding below, to the extent it is supported by the record.

- (7) **Criminal Law § 371—Evidence—Admissibility—Confessions—Voluntary Character—Inducements by Interrogators.**—A confession is considered voluntary if the accused's decision to speak is entirely self-motivated, i.e., if he freely and voluntarily chooses to speak without any form of compulsion or promise of reward. However, where a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law. Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise, does not, however, make a subsequent confession involuntary.
- (8a, 8b) **Criminal Law § 371—Evidence—Admissibility—Confessions—Voluntary Character—Inducements by Interrogators—Implied Promise of Leniency.**—In a prosecution for robbery, kidnapping, and murder based on a robbery-kidnapping incident and a robbery-murder incident, a police detective's conduct in interrogating defendant as to the robbery-kidnapping and in informing him that he could not promise leniency but only pass any information along to the district attorney, who had the authority to make such an offer, did not amount to an implied promise of leniency if defendant would give information regarding the robbery-murder, notwithstanding that at the time of the interrogation the detective considered defendant a suspect in the robbery-murder. Further, since such conduct did not render the statement involuntarily given, defendant's subsequent statements admitting his participation in the robbery-murder were not unlawful fruits of the first statement.
- (9) **Criminal Law § 373—Evidence—Admissibility—Confessions—Voluntary Character—Failure to Inform Defendant He Is Suspect.**—In a prosecution for murder, kidnapping, and robbery based on a kidnapping-murder incident and a robbery-murder incident, the failure of police, who were holding defendant as a suspect in the kidnapping-robbery incident, to inform him that he was a suspect in the robbery-murder incident, did not render involuntary his statement to police regarding the robbery-murder, in which statement defendant did not admit any complicity but sought to incriminate others.
- (10) **Criminal Law § 128—Interrogation; Advice as to Constitutional Rights—Capacity to Waive Rights.**—In a prosecution for robbery, kidnapping, and murder, defendant did not lack the capacity to make a knowing and voluntary waiver of his rights before making a statement, where, although one detective described defendant's "very hy-



- per, very nervous condition," the evidence did not indicate that defendant was so distraught that his will to resist confession was overborne.
- (11) **Criminal Law § 371—Evidence—Admissibility—Confessions—Voluntary Character—Inducements by Interrogators—Statement That Defendant Was More Involved Than He Admitted.**—In a prosecution for robbery, kidnapping, and murder based on a robbery-kidnapping incident and a robbery-murder incident, a statement made by a police detective to defendant that he believed defendant was more involved in the robbery-murder than he was admitting did not amount to an illegal inducement rendering involuntary defendant's subsequent admission to his participation in the robbery-murder. The detective did not tell defendant that his previous statement, in which defendant implicated others but admitted to being with them, constituted a confession or that any further statement could not result in any greater liability.
- (12) **Criminal Law § 658.2—Appellate Review—Harmless Error—Evidence—Prior Conviction or Misconduct—Previous Offense Showing Identity or Intent.**—In a prosecution for robbery, kidnapping, and murder in which the trial court admitted evidence of the circumstances of defendant's previous robbery and kidnapping to show identity or intent, any error in such admission was harmless, since there was no reasonable probability that defendant would have obtained a more favorable result had the evidence been excluded. Defendant's defense was damaged beyond repair, even without consideration of the prior crime, by a codefendant's testimony, inferences from the placement of footprints at the location of the murder, and defendant's extensive knowledge of the details of the robbery and shooting.
- (13) **Criminal Law § 244—Instructions—Proof of Fact by Testimony of Single Witness.**—In a prosecution for robbery, kidnapping, and murder, the giving of an instruction permitting proof of any fact by the testimony of a single witness was not error even though the critical evidence in the case on a central issue came from an accomplice, where the court also instructed on the principles that an accomplice's testimony should be viewed with caution, that a defendant cannot be convicted on the testimony of an accomplice unless that testimony is corroborated, and that if anyone committed the robbery, kidnapping, and murder, defendant was an accomplice as a matter of law. Although the use of the single-witness instruction is discouraged in cases where one witness's testimony requires corroboration, so long as the

appropriate instructions on the use of accomplice testimony are given, the giving of a single-witness instruction is not error.

- (14) **Homicide § 110—Appeal—Harmless Error—Instructions—Intent to Kill.**—In a prosecution for robbery, kidnapping, and murder, the trial court did not prejudicially err in failing to instruct the jury that it could not find the felony-murder special circumstance true unless it found that defendant intended to kill at the time of the homicide. Although an instruction was warranted on the basis of defendant's testimony that he was not the killer, the error in failing to give it was cured by the jury's special verdict that defendant personally killed the victim with express malice aforethought and premeditation and deliberation. Further, defendant was bound by this finding, even though he did not have reasonable advance notice that the special verdict would be presented to the jury, since defendant argued throughout pretrial proceedings that it would be unconstitutional to impose the death penalty in the absence of proof that he actually killed or intended that a killing occur, and he addressed the issue in his defense testimony by denying any knowledge or intent that a killing would occur.
- (15) **Jury § 34—Challenges and Corrections—Grounds—Exclusion of Persons and Classes—Persons Opposing the Death Penalty.**—In a prosecution for robbery, kidnapping, and murder, the removal from the guilt phase jury of 11 persons who would automatically vote against death at the penalty phase but who could render an impartial verdict on the issue of guilt or innocence did not violate the constitutional requirement that defendant's jury be drawn from a fair cross-section of the community and his constitutional right to trial by an impartial jury.
- (16) **Jury § 47—Challenges and Corrections—Peremptory—Persons Opposing Death Penalty.**—In a prosecution for robbery, kidnapping, and murder, the prosecution's use of peremptory challenges on all prospective jurors with reservations about the death penalty did not deny defendant an impartial jury on the issue of penalty nor constitute group bias.
- (17a, 17b) **Jury § 43—Challenges and Corrections—For Cause—Voor Dire—Inquiry as to View on Capital Punishment.**—In a prosecution for robbery, kidnapping, and murder, three jurors were properly excluded due to their views on capital punishment, where two of them, despite some early uncertainty, eventually stated that they could not impose the death penalty, and where the third stated that she could

not impose the death penalty except in a case involving a crime against her child.

- (18) **Jury § 43—Challenges and Corrections—For Cause—Voor Dire—Inquiry as to View on Capital Punishment—Standard for Disqualification.**—The standard for determining whether a prospective juror's views on the death penalty should disqualify him from serving in the trial of a capital offense is whether his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. This standard does not require that a juror's bias be proved with unmistakable clarity. The appellate court's task is to examine the context surrounding the juror's exclusion to determine whether the trial court's decision that the juror's beliefs would substantially impair the performance of his duties as a juror is fairly supported by the record.
- [Comment note on beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases, note, 39 A.L.R.3d 550.]
- (19a, 19b) **Homicide § 101—Punishment—Death Penalty—Aggravating and Mitigating Circumstances—Prior Offenses.**—In the penalty phase of a prosecution for robbery, kidnapping, and murder, evidence presented about defendant's commitment to the California Youth Authority and parole, testimony by officers about defendant's untruthfulness, possession of stolen property and possession of marijuana in jail, and testimony by victims of other offenses about the impact that those offenses had on their lives, were improperly admitted, since none of this evidence pertained to a prior felony conviction (Pen. Code, § 190.3, subd. (c)) or criminal activity involving force or violence (Pen. Code, § 190.3, subd. (b)). Admission of evidence of two other incidents (an assault and robbery) was improper, since the prosecution failed to give proper notice as required by Pen. Code, § 190.3. However, such admission was harmless in light of properly admitted aggravation evidence of four robberies, a brick-throwing incident, and a conspiracy to escape from jail.
- (20) **Homicide § 101—Punishment—Death Penalty—Aggravating and Mitigating Circumstances—Escape Plan.**—In the penalty phase of a prosecution for robbery, kidnapping, and murder, the trial court did not err in admitting evidence of defendant's plan to escape from jail during the trial. Violent criminal activity need not have preceded the charged crimes to be admissible under Pen. Code, § 190.3, subd. (b), and defendant's plan called for use of a gun to subdue a guard if

necessary and thus met the "force or violence" requirement of subd. (b). Further, the evidence revealed the technically complete crime of conspiracy to escape and thus qualified as "criminal activity" under subd. (b), and sua sponte instructions on the elements of conspiracy were not required.

- (21) **Homicide § 96—Instructions—Aggravating and Mitigating Circumstances—Other Extenuating Circumstances.**—In the penalty phase of a prosecution for robbery, kidnapping, and murder, the giving of an instruction in the unadorned language of Pen. Code, § 190.3, subd. (k) (jury must consider any other circumstance extenuating gravity of crime even though it is not legal excuse for crime), did not mislead the jury into thinking it could not consider evidence relating to defendant's background and character, where the jury was instructed to consider all of the evidence that had been received during any part of the trial of the case, and where all of the defense evidence at the penalty phase related to defendant's background and character.
- (22) **Homicide § 96—Effect of Antisymmetry Instruction on Penalty Phase.**—In a prosecution for robbery, kidnapping, and murder, the giving of an antisymmetry instruction at the guilt phase did not mislead the jury into believing it could not consider sympathy at the penalty phase, where the jury was instructed to consider all of the evidence that had been received during any part of the trial of the case, and where all of the defense evidence at the penalty phase related to defendant's background and character.
- (23) **Homicide § 96—Instructions—Aggravating and Mitigating Circumstances—Deletion of Inapplicable Circumstances.**—In the penalty phase of a prosecution for robbery, kidnapping, and murder, the trial court did not err in failing to delete all inappropriate mitigating factors from its instructions on aggravating and mitigating circumstances.
- (24) **Homicide § 96—Instructions—Aggravating and Mitigating Circumstances—Overlap of Circumstances.**—In the penalty phase of a prosecution for robbery, kidnapping, and murder, the trial court did not err in failing to modify an instruction on mitigating and aggravating factors to make it clear that Pen. Code, § 190.3, subd. (c) (prior felony convictions), applied only to items that were not already covered by Pen. Code, § 190.3, subd. (a) (circumstances of the present offense), and Pen. Code, § 190.3, subd. (b) (violent criminal activity). The only clarification that was called for was that the charged crimes should be considered only under § 190.3, subd. (a), however, a reasonable jury

would not have considered the circumstances of the crime more than once.

- (25) **Homicide § 101—Punishment—Death Penalty—Submission to Jury of Separate Special Circumstances Arising From Same Course of Conduct.**—In the penalty phase of a prosecution for robbery, kidnapping, and murder, the trial court did not err in submitting both the robbery and kidnapping-for-robbery special circumstances to the jury, notwithstanding defendant's contention that the offenses were committed as part of a single, indivisible course of criminal conduct.
- (26) **Homicide § 96—Instructions—Aggravating and Mitigating Circumstances—Weighing Process.**—In the penalty phase of a prosecution for robbery, kidnapping, and murder, the trial court did not mislead the jury by instructing it in the language of Pen. Code, § 190.3, that if it concluded that the aggravating circumstances outweighed the mitigating ones it must impose a sentence of death, where both the prosecutor and defense counsel repeatedly told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. Comments made by the prosecutor to unsworn jurors during individual voir dire could not carry forward to create reversible error in the penalty phase, and the prosecutor's exhortations in the penalty phase for the jury to limit sentencing considerations to record evidence were proper.
- (27) **Homicide § 107—Appeal—Harmless Error—Argument of Prosecutor—Effect of Absence of Mitigating Circumstances.**—In the penalty phase of a prosecution for robbery, kidnapping, and murder, it was not reversible error for the prosecutor to have asserted during closing argument that the absence of mitigating circumstances constituted aggravation, where the assertion was made before a California Supreme Court case holding that such argument should not be permitted in the future, and where the assertion occurred only once at the outset when the prosecutor went through the list of aggravating and mitigating factors in light of the evidence presented. The jury was not misled, since it was instructed to consider the sentencing factors only "if applicable."
- (28) **Criminal Law § 113—Rights of Accused—Competence of Defense Counsel—Failure to Object to Admission of Aggravation Evidence in Homicide Trial.**—In the penalty phase of a prosecution for robbery, kidnapping, and murder, trial counsel was not ineffective for failing to object to evidence that defendant planned to escape while in jail dur-

ing trial and to evidence in aggravation for which proper notice was not given, since the substantive matters forming the basis for the ineffectiveness claim either were not error or did not cause prejudice.

- (29) **Homicide § 101—Trial and Punishment—Punishment—Death Penalty—Modification of Judgment of Death.**—In the penalty phase of a prosecution for robbery, kidnapping, and murder, the trial court did not err in failing to modify the judgment of death pursuant to Pen. Code, § 190.4, subd. (e), notwithstanding defendant's contention that such failure was based on the court's erroneous belief that the evidence defendant presented at the penalty hearing did not constitute mitigation. The court's statement that there was little, if anything, in mitigation but many factors in aggravation was clearly a reference to the weight it thought should be given to the mitigating evidence.

COUNSEL

John M. Bishop, under appointment by the Supreme Court, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Jay M. Bloom, Frederick R. Millar and John W. Carney, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

PANELLI, J.—Appellant Richard Boyde was convicted of robbery and kidnapping for robbery and found to have personally used a knife in perpetrating these offenses upon a gas station attendant in Riverside on January 5, 1981. (Pen. Code, §§ 211, 209, subd. (b), 12022, subd. (b).)¹ In addition, Boyde was convicted of robbery, kidnapping for robbery, and first degree murder of the clerk in a 7-Eleven store in Riverside on January 15, 1981. (§§ 211, 209, 189.) The jury found two special circumstances true (murder during the commission of robbery (§ 190.2, subd. (a)(17)(i)) and during the commission of kidnapping in violation of section 209 (§ 190.2, subd. (a)(17)(ii))), found that Boyde personally used a firearm in perpetrating all three offenses (§ 12022.5), and specially found that Boyde "personally killed [the victim] with express malice aforethought and premeditation and deliberation." The jury fixed the penalty at death; the appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

¹All further statutory references are to the Penal Code unless otherwise indicated.

I. FACTS

A. The Gas Station Robbery.

About 2 a.m. on January 5, 1981, the attendant at a Union 76 gas station in Riverside was robbed of \$50 and his watch by a man who had entered the office and displayed two knives. Following the robber's directions, the attendant, Baker, opened the trunk of his car (which was full of miscellaneous items), closed the trunk, turned out the lights, closed up the station, and drove away with the robber in Baker's car. They drove to a park where they smoked a cigarette and talked. The robber said he was out of a job, having just returned from college in the east, and he needed the money to feed his two-month-old baby. He warned Baker not to run away and said he did not plan to use the knives but only had them for self-protection in case Baker tried to "be a hero." The robber then had Baker drive to a doughnut stand where he bought Baker a doughnut. They began walking down the street together after they could not get the car started. During this walk the robber indicated he expected to get caught and asked Baker to give a false description to police. Baker said he would not, and shortly thereafter the robber abruptly turned and ran away.

Baker gave a description to police and later selected Boyde's picture from a photo lineup. He also identified Boyde at trial.

B. The 7-Eleven Robbery-homicide.

About 4 a.m. on January 15, 1981, Riverside police received a report that the 7-Eleven store on Indiana Street was deserted. Investigating officers found a bullet hole in the store window. With the help of the owner it was determined that \$33 had been taken from one of the cash registers and that several hats and hatbands were missing.

Three and one-half hours after the initial report, a local citizen found a body in a nearby orange grove and reported his finding to police at the 7-Eleven store. Investigators found the body, later identified as the store's night clerk Dickie Gibson, lying on its back in the dirt. Detective Callow noticed a gunshot wound in the victim's forehead, a slight wound on the small finger of his right hand, and abrasions on his knees. There were five identifiable footprints at the scene, including an impression left by a flat-soled left shoe near the victim's head and several impressions with a diamond pattern located four feet from the body, near its feet. The autopsy showed the victim was killed by a bullet wound above the right ear, which was probably fired from a .22 caliber gun from a distance of more than 16 inches. There were also gunshot wounds to the fingers of the right hand.

The shot to the forehead had not penetrated the skull and was not the cause of death, but the nature of the wound indicated it had been inflicted from close range, probably six to twelve inches. The abrasions on the hands and on the knees could have been caused by a hard dirt or asphalt surface. Death probably occurred between 3 a.m. and 5 a.m. on January 15. The victim's brother testified that everything had appeared normal when he stopped by the store for a visit between 1 and 1:40 a.m.

C. Appellant's Arrest and Statements to Police.

Detective Knoffloch, who was investigating the 7-Eleven homicide, showed Boyde's photo to Detective Callow, who was investigating the Baker robbery at the gas station as well as the homicide. After Baker selected Boyde's photo from a photo lineup, Callow obtained a warrant to search Boyde's home. The search recovered a distinctive watch which Baker identified as his. Boyde was placed under arrest on January 22 for the robbery and kidnapping of Baker.

At 8:15 that evening, Callow found Boyde yelling and creating a disturbance in the holding cell. Callow described Boyde as "very, very hyper"; his arms were clutched across his chest and he was physically shaking. Boyde told Callow he could not stand being locked up. Callow took him to an interview room and gave him cigarettes and coffee.

After advisement as required by *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974], Boyde waived his rights and agreed to discuss the gas station robbery with Detective Callow. Callow informed Boyde he was under arrest for this robbery and that the watch recovered from Boyde's home had been stolen in it. Boyde denied involvement and claimed he had bought the watch from "Moe." Confronted with information that clothing recovered from his home matched the description of the robber's clothes, Boyde claimed he had loaned the clothes to "Moe." Told that the victim had selected his picture in a photographic lineup, Boyde explained that "Moe" looked quite a bit like him. Finally, confronted with Callow's assertion that police had sufficient evidence to prove he committed the robbery, Boyde said, "you got me."

Boyde then became disturbed at the prospect of returning to prison or jail and asked if there were any way he could avoid it. Callow told him "six or seven times" the police department could not make any such promises. Boyde then asked what would happen if he had information — specifically about the football coach at the 7-Eleven store who was killed. Callow said that he would be willing to relay his information to the district attorney's office.



Boyde then told Callow that he had been at his nephew Carl Franklin's² house between 2:30 and 3 a.m. when his nephew and Big Mike drove up in Big Mike's car. Big Mike got out, holding a paper bag with money in it and a gun. Eventually, Ellison told Boyde the two men had held up the 7-Eleven store on Indiana Street and had taken the clerk to an orange grove and shot him in the head. Boyde identified Big Mike's gun as a .22 caliber revolver.

Unable to find any Department of Motor Vehicles or police department record of "Carl Franklin" or "Big Mike," Callow asked Boyde if he would be willing to show officers Carl Franklin's house. Boyde agreed and directed the officers to Ellison's house. Boyde was not able to find Big Mike's house.

At 8:30 the next morning Detectives Ropac and Lund, also unable to find any information on "Big Mike" or "Carl Franklin," confronted Boyde with their belief that he had been untruthful with Detective Callow. Boyde agreed to talk further, and a second *Mirandized* interrogation was conducted and tape-recorded. This time Boyde admitted he had been with Ellison from 11 p.m. on January 14 through the time of the homicide. Boyde explained that Ellison had come to Boyde's apartment complex to borrow some gas money from his grandmother. Ellison invited Boyde to go riding with him in his mother's car. The two rode to Ellison's house in Hillside where they drank some beers with guys from the neighborhood, including Big Mike. The group broke up about 11:45, and Big Mike invited Boyde to go riding with him and Ellison. Boyde accepted but asked to be home early. The three drove to San Bernardino, around Riverside and then returned to Ellison's house. There Ellison pulled out a loaded .22 caliber hand gun that belonged to Ellison's mother, Otharean Owens.

The three men drove to the 7-Eleven store at Indiana and Monroe Streets so that Boyde could buy cigarettes and a soda. Both Boyde and Big Mike got out of the car, but Big Mike went into the store alone while Boyde and Ellison waited outside. It was late. The clerk unlocked the door to let Big Mike in, and Big Mike walked to the back of the store. As Boyde was returning to the car, he looked up in time to see Big Mike pull the gun on the clerk who raised his hands and then put money from the cash register into a bag. Big Mike then brought the clerk outside and told him to get in the back seat of the car. The clerk did not close the car door completely, and as Big Mike entered the other rear door, the clerk threw a stereo speaker at him and ran from the car. Big Mike fired once and then chased him. The clerk fell near the side of the store, and Big Mike caught up with him. They returned to the car, and Big Mike told Ellison to drive up

² The codefendant, Boyde's nephew, is named Carl Franklin Ellison. For the sake of clarity we will refer to him as Ellison.

Monroe toward the orange groves. Boyde tried to convince Big Mike to let the clerk go, but he refused.

They stopped the car on the pavement near the groves. Big Mike and the clerk walked into the trees. The clerk did not try to escape but asked whether he would be shot. Big Mike said no. Ellison turned the car around. From 25 to 30 feet Boyde could see Big Mike force the clerk to get on his knees facing the trees and place his hands on top of his head. Big Mike stood behind. After Big Mike fired once, the clerk dropped his hands and turned partly around. Big Mike fired a second shot into the back of the clerk's head, and he fell face forward in the dirt. Big Mike rolled the clerk's body over and fired another shot into his head from about a foot away.

The detectives expressed their skepticism at Boyde's ability to describe the robbery in such detail if he had not been inside the store. Finally, Boyde broke down and admitted that he and Ellison had been in the store and there was no one named Big Mike involved. Boyde said he and Ellison had gone out that night for the purpose of committing a robbery because Ellison needed some money. Ellison had trouble selecting a target, and it was about 2:30 a.m. before he finally decided he wanted to rob the 7-Eleven store. They pulled into a nearby driveway, and Boyde took over the wheel. Both men entered the store, but Boyde had gone back outside before Ellison pulled the gun. They had never discussed kidnapping the clerk, but Ellison brought him out of the store and told him to get in the back seat of the car behind Boyde who was driving. When the clerk ran, it was Ellison who fired the gun and chased him. They drove to the orange grove where Ellison and the clerk got out. Boyde turned the car around and then got out and walked into the grove. Ellison forced the clerk to kneel with his hands on his head. The first shot missed; the clerk brought his hands down and looked at one of them. Then Ellison fired a shot into back of the clerk's head. The clerk fell forward. Boyde asked if he was dead. Ellison did not know and said he thought he better make sure. Ellison put the gun in his pocket, grabbed the clerk's body by the legs and rolled him over so that the body was parallel to a ditch. The clerk was unconscious and making no audible sounds. Ellison shot him again in the head. Boyde drove them back to Ellison's house where Ellison stashed the used shells and the gun in the garage. Ellison took Boyde home.

Boyde described the kind of money taken in the robbery (a few ones, two fives and some change). He said he had worn tennis shoes but didn't remember where that particular pair was. He said Ellison was wearing canvas-topped, rubber-soled walking shoes.

D. Ellison's Arrest and Statements.

Based on Boyde's statement, the officers arrested Ellison and obtained warrants to search his house and car. Officers seized a .22 caliber revolver, two pairs of tennis shoes, and the car stereo speaker Boyde had described. The bullet fragments recovered from the victim could not be positively matched with the gun because of damage to the fragments. The tires of Ellison's mother's car were found to be consistent with tracks at the orange grove, but were not positively matched. One pair of size 13 tennis shoes was consistent with the diamond pattern footprints at the scene but could not be positively matched. The other tennis shoes were dissimilar to impressions at the scene. It was determined that Ellison wore a size 13D shoe and Boyde wore a size 9½C. The flat soled shoe prints near the victim's head were made by a shoe which was in the range of size 7 to size 9.

In an initial interview just after his arrest Ellison told police he had gone to bed at 10 p.m. on January 14 and said he knew nothing about the 7-Eleven robbery. In a second interview several hours later, after police had recovered the gun and some shoes from his house, Ellison continued to maintain his ignorance of the events. Officers then played portions of a tape in which Boyde stated that Ellison had shot the clerk. Ellison finally admitted he was there and said the shooting had happened "just like he [Boyde] said." Ellison then gave a statement which generally paralleled Boyde's description of the incident. It differed, however, in several important details. Ellison said the clerk tried to run away once coming out of the store, a second time from the car and a third time in the orange grove. Ellison placed the clerk alone in the back seat of the car, while Boyde had said Ellison rode in the back with the clerk. Ellison said he had fired two shots, not three, but did not know where the clerk had been wounded. It was dark, and Ellison closed his eyes when firing the first shot. Ellison said he discarded the spent cartridges in the orchard and that Boyde had hidden the gun in Ellison's mother's room. The interviewing officers expressed doubt about the truthfulness of the statement because Ellison did not know enough of the details, but Ellison stuck to it. He agreed to submit to a polygraph the following day.

Ellison stuck to his story during the initial portion of his interview with the polygraph operator, but later recanted. He claimed he did not kill the clerk, but that Boyde did. He said they had gone to the 7-Eleven to "take the money and leave," but Boyde had shot the clerk. Ellison then gave a detailed account of how the robbery came about. He claimed it was Boyde's idea, that Boyde had asked him to bring the gun and he had done so, that Boyde had driven around and selected the store and then had Ellison drive during the robbery, that Boyde had explained afterwards that he had to kill

the clerk because he was determined not to go back to prison. Ellison said he had gone into the grove to see what Boyde was doing and that he had turned the clerk over because Boyde told him to. Ellison was scared; he knew the man was dead. He said he had covered up for Boyde because he felt he bore half the responsibility because he had been present and because he knew Boyde would serve more time as a result of his prior conviction.

II. SUMMARY OF PROCEEDINGS

Boyde, 24, and Ellison, 19, were jointly charged in the robbery, kidnapping and murder of Dickie Gibson, the night clerk at the 7-Eleven store. Only Boyde was alleged to have personally used a firearm in these crimes. (§ 12022.5.) Boyde was also charged with the robbery and kidnapping of Baker, the gas station attendant, and three prior convictions were alleged against him. One of the prior offenses was the robbery and kidnapping of the night clerk at the same 7-Eleven store on July 13, 1976.

The trial court heard extensive pretrial motions, including Boyde's motion to sever the counts alleged against him (§ 954), Boyde's motion to exclude evidence of his prior crimes (Evid. Code, § 1101), both defendants' motions to sever their trials (§ 1098), to suppress their incriminating statements to police (for asserted involuntariness and *Miranda* violations) and to exclude portions of those statements implicating the nondeclarant defendant in the Gibson robbery-murder. (*Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476, 88 S.Ct. 1620]; *People v. Aranda* (1965) 63 Cal.2d 518 [47 Cal.Rptr. 353, 407 P.2d 265].)

Codefendant Ellison waived a jury trial several days before the hearing on the motion to sever trials. In light of that development, the court denied the motion to sever trials and granted defendants' motions to exclude each other's extrajudicial statements from their trials. The court also ruled that Boyde's jury could hear Ellison's anticipated defense testimony.

Following lengthy voir dire, the trial proceeded with the prosecution's case-in-chief against Boyde. The prosecutor presented testimony by Baker describing the nature and circumstances of the January 5, 1981, gas station robbery and Baker's in-court identification of Boyde as the perpetrator. The officers who investigated both 1981 crimes testified concerning fruits of the gas station robbery found in Boyde's home, the physical evidence at the 7-Eleven store, the physical evidence at the site where Gibson's body was found and the autopsy results. Boyde's three tape-recorded statements to investigating police officers were played for the jury. Otharean Owens—Ellison's mother and Boyde's sister—testified that during a conversation at the jail, Boyde admitted to her that Ellison was not involved in the killing.

On this state of the evidence the prosecution rested its case-in-chief. Both defendants moved for acquittal. (§§ 1118 and 1118.1.) The court denied both motions.

Boyde's defense consisted only of the testimony of Deputy District Attorney Robert Spitzer, which was offered in support of Boyde's claim that his incriminating statements were involuntary because they were elicited by a promise of lenience. (*People v. Jimenez* (1978) 21 Cal.3d 595 [147 Cal.Rptr. 172, 580 P.2d 672].)

Ellison testified in his own defense before the jury. Unlike his prior statements to police, Ellison's trial testimony placed the blame for the 7-Eleven store robbery and killing entirely on Boyde. Ellison said he had given his mother's revolver to Boyde on the day before the 7-Eleven robbery, after Boyde asked where he could get a gun. Boyde asked Ellison to help commit a robbery, but Ellison hesitated. On the night of the 14th Ellison went to his grandmother's to borrow gas money. There he picked up Boyde. They drove to Boyde's girlfriend's house in San Bernardino, then returned to Riverside. Boyde asked Ellison to drive to a 7-Eleven store in La Sierra. When they got there Boyde told Ellison to rob the store. Ellison refused and pushed the gun away as Boyde tried to give it to him. As they drove back to Ellison's house, Boyde angrily called Ellison names. Ellison was frightened of Boyde. Some time later—around 2 a.m.—Boyde asked to be driven home and said he wanted to stop for cigarettes. At that time Ellison was aware of the gun lying on the front seat. Ellison, knowing the Indiana Street 7-Eleven would be open, drove there.

Boyde went into the store for cigarettes while Ellison stayed in the car. Ellison saw Boyde draw the gun and rob the clerk. Ellison got scared and started to back the car out of the parking space, but Boyde came to the door and told him to stop. Boyde brought the clerk outside, put him in the rear passenger side seat, and then walked to the driver's side rear door. As he was getting into the other rear seat, the clerk threw a loose speaker at Boyde and bolted from the car. Boyde fired a shot and chased him. Boyde brought the clerk back to the car at gunpoint. The clerk again got into the rear seat, and Boyde got into the front passenger seat.

Boyde told Ellison to drive. When they reached the orange groves, Boyde told Ellison to stop and turn off the lights. He ordered the clerk out of the car and told Ellison to turn the car around.

Ellison did as he was told, returned to the spot where he had left the others, and went into the grove to find Boyde. He heard a shot. When he found Boyde and the clerk, the clerk was lying on the ground breathing

loudly. Boyde told him to turn the clerk over, but Ellison refused and ran for the car. The car stalled; before Ellison could get it started he heard another shot. Boyde got in, saying, "let's get out of here."

Ellison asked why Boyde had shot the clerk, and Boyde said he would not go back to prison. Boyde told Ellison he had better not talk, that he was just as much at fault, and reminded him that the gun belonged to his mother. Ellison took Boyde home, left the gun with him, and then went home himself.

Ellison stated he did not know Boyde was going to rob the 7-Eleven on Indiana Street, did not know Boyde would kidnap the clerk, did not shoot the gun, and did not touch the clerk's body. As to his feelings about the clerk's death, Ellison testified, "if I could give my life to bring him back, I would do it."

Questioned about his earlier inconsistent statements to police, Ellison testified that he tried to take the blame for Boyde because he was scared of the consequences of his own involvement and because he did not want to see his uncle go back to prison.

On cross-examination Boyde's counsel emphasized Ellison's admission that he had given the gun to Boyde, Ellison's initial willingness to help with a robbery, and Ellison's motive for committing a robbery: Even though Ellison worked steadily for the City of Riverside, he had little or no money left after helping his mother out with the family expenses. Counsel challenged Ellison's claim that he acted out of fear of Boyde and pointed out that Ellison drove the car and selected a store he knew was open at 2 a.m. Counsel questioned Ellison extensively regarding his actions in the orange grove and compared Ellison's account to the photographic evidence showing footprints consistent with Ellison's very near the clerk's feet.

Boyde's counsel and the prosecutor jointly moved to introduce the transcripts and tape recordings of Ellison's extrajudicial statements as prior inconsistent statements (Evid. Code, § 1235), and the tapes were played for the jury.

Ellison's only other defense witness was Lucinda Taylor, his half-sister. Taylor testified that Boyde had come by Ellison's house on January 15 and that he seemed nervous. The two had sat in Ellison's mother's bedroom watching television for a while. Boyde sent her out of the room on contrived errands at least three times.¹

¹The gun was found by police under Otharean Owens's mattress.

In rebuttal of Ellison's evidence, Boyde called his wife Cynthia Boyde, who contradicted Otharean Owens's testimony about Boyde's alleged visiting-room admission of Ellison's innocence. Boyde also called his sister, Helen Kendricks, who corroborated Cynthia Boyde's testimony, and Preston Scott, who testified that Boyde was with him in Whittier for the whole day of January 15 and that he was not at Ellison's house that day.

Finally, Boyde testified in his own defense on rebuttal. Boyde placed primary blame for the robbery and complete responsibility for the killing on Ellison. Boyde testified that Ellison had talked with him about Ellison's frustration with his financial obligation to his mother and his need for more money to meet his personal expenses. Ellison proposed stealing the money he needed, but Boyde warned him of the dangers of doing so, including the possibility that he would be caught and sent to state prison. Nevertheless, on January 14 Ellison made up his mind to commit a robbery, and Boyde agreed to assist him.

Ellison obtained the gun from his mother's room. They met at Ellison's grandmother's and then drove to San Bernardino, back to Riverside and finally to La Sierra where Ellison knew of a possible target store. Once there Ellison realized he might be recognized because he often worked nearby and decided not to go through with the robbery. It was now about 2 a.m. and Boyde asked to be taken home. But Ellison wanted to visit a friend who lived in the apartments near the Indiana Street 7-Eleven. Boyde agreed since he wanted to buy cigarettes. After Ellison finished visiting his friend, he asked Boyde to drive. Boyde drove to the 7-Eleven and waited while Ellison went in for the cigarettes and a soft drink. Boyde started to follow Ellison into the store, but Ellison was already coming out with the clerk in front of him. He tried to put the clerk in the back seat, but the clerk ran. Ellison caught him and managed to get him into the car. He told Boyde to drive to the orange grove where he and the clerk got out and Ellison told Boyde to turn the car around. As he was turning the car, Boyde heard a shot from the grove. He returned to tell Ellison that he had seen another car up the road. When he found Ellison and the clerk in the orange grove, the clerk was lying face down in the dirt. Boyde had by then heard three shots in all. Ellison rolled the clerk over and, to make sure he was dead, fired the final shot into the clerk's forehead. Boyde watched from 10 feet away.

As they drove off, Ellison threw the spent shells out the car window. Ellison didn't want to talk about what had happened. Boyde testified that he had not expected a killing to happen, that he did not intend anyone be killed and that he did not himself shoot the clerk.

Boyde spent the following day with Preston Scott in Whittier; he was not at Ellison's house. He denied ever telling Otharean Owens that Ellison was not involved in the killing.

In spite of photographic evidence showing that the three sets of footprints in the orange grove which related to the crime were made by the clerk, tennis shoes similar in size and diamond tread pattern to Ellison's, and a pair of flat-soled shoes consistent with Boyde's shoe size, Boyde testified that he had worn tennis shoes with a circular sole pattern on the night of the homicide. He explained that he could not have worn his dress shoes that night because his brother-in-law had borrowed them prior to January 14. But his own witness, Helen Kendricks, testified that her husband borrowed the suit and shoes after Boyde was arrested and that they had never been returned because something happened to them.

The prosecutor went through the details of the three versions of the crime given in Boyde's prior statements. On the stand Boyde admitted he could not see the shooting from the car (as he said in his second version) and claimed, for the first time, that he knew the details of the first two shots only because Ellison had told him exactly what happened. On the stand Boyde said he had lied when he told Detectives Ropac and Lund that he saw Ellison make the victim kneel and fire the first two shots. When questioned about the location of the various footprints—particularly the smaller sized, flat-soled prints near the victim's head—Boyde responded only that neither he nor Ellison had worn such shoes.

The jury found Boyde guilty of all charged offenses and returned a special verdict that Boyde personally committed the homicide with malice, premeditation and deliberation.

The court found Ellison guilty of all counts charged. At sentencing, however, the court found Ellison's lesser culpability as an aider and abettor warranted striking the special circumstances. (*People v. Williams* (1981) 30 Cal.3d 470 [179 Cal.Rptr. 443, 637 P.2d 1029].) Ellison was sentenced to the term prescribed for first degree murder, 25 years to life.

III. CLAIMS OF GUILT PHASE ERROR

A. Motion to Sever.

(1a) Boyde contends that the trial court's refusal to order separate trials for the defendant constituted a prejudicial abuse of discretion. The California Penal Code provides for joint trials of defendants jointly charged with criminal offenses. "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials. . . ." (§ 1098.) (2) The Legislature has in this manner expressed a preference for joint trials. (See *People v. Lara* (1967) 67 Cal.2d 365, 394 [62 Cal.Rptr. 586, 432 P.2d 202].

People v. Isenor (1971) 17 Cal.App.3d 324, 330-331 [94 Cal.Rptr. 746].) The statute nevertheless permits the trial court to order separate trials, and the decision to do so is one "largely within the discretion of the trial court." (*People v. Turner* (1984) 37 Cal.3d 302, 312 [208 Cal.Rptr. 196, 690 P.2d 669]; *People v. Graham* (1969) 71 Cal.2d 303, 330 [78 Cal.Rptr. 217, 455 P.2d 153].) Whether denial of a motion to sever constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion to sever. (*People v. Turner, supra*, 37 Cal.3d at p. 312.)

(3) The grounds which may justify a severance were summarized in *People v. Massie* (1967) 66 Cal.2d 899 [59 Cal.Rptr. 733, 428 P.2d 869]: (1) Where there is an extrajudicial statement made by one defendant which incriminates another defendant and which cannot adequately be edited to excise the portions incriminating the latter; (2) where there may be prejudicial association with codefendants; (3) where there may be likely confusion from evidence on multiple counts; (4) where there may be conflicting defenses; and (5) where there is a possibility that in a separate trial the codefendant may give exonerating testimony. (*People v. Massie, supra*, 66 Cal.2d at pp. 916-917.)

In arguing the motion, Boyde's counsel conceded that there was no longer an *Aranda* problem (*supra*, 63 Cal.2d 518) after Ellison's waiver of a jury trial. Counsel nevertheless argued strenuously in favor of severance on the ground of inconsistent defenses. Counsel's principal concern was about the prejudice that would result from Boyde's jury hearing Ellison's testimony. Counsel noted that the defendants' defenses were inconsistent and mutually antagonistic in that each attempted to place primary responsibility on the other for the robbery and murder.

Although several California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, none has found an abuse of discretion or reversed a conviction on this basis. (See *People v. Massie, supra*, 66 Cal.2d 899, *People v. Turner, supra*, 37 Cal.3d 302; *People v. Jones* (1970) 10 Cal.App.3d 237 [88 Cal.Rptr. 871]; *People v. Wheeler* (1973) 32 Cal.App.3d 455 [108 Cal.Rptr. 26].) Indeed, we recently rejected such a claim in *People v. Turner, supra*, 37 Cal.3d at pages 311-313, where Turner presented no defense and his codefendant Souza testified that Turner was the killer and that he had assisted in the robbery because he feared Turner. We noted that there is a statutory preference for joint trials (see § 1098) and that the "instant case provided the classic situation for joint trial—defendants charged with common crimes against common victims. ["] As to conflicting defenses, counsel could articulate no reason for separate trials except to point out that the prosecution would simply put on

its case, then sit back and watch as defense counsel became the real adversaries. Of course, if that point has merit, separate trials would appear to be mandatory in almost every case." (37 Cal.3d at pp.312-313.)

On the basis of the showing made in *Turner* at the time of the motion—two defendants charged with murders under circumstances in which they were jointly involved and might be expected to attempt to cast primary blame on the other—we concluded that the trial court had not abused its discretion in denying separate trials. We noted, however, that such a ruling could still be the basis for reversal after trial if the reviewing court determined that, "because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law. . . . [However,] no denial of a fair trial results from the mere fact that two defendants who are jointly tried have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution." (*Id.* at p.313.)

The Ninth Circuit Court of Appeals refused to find an abuse of discretion in similar circumstances. In *United States v. Brady* (9th Cir. 1978) 579 F.2d 1121 (cert. den. 439 U.S. 1074 [59 L.Ed.2d 41, 99 S.Ct. 849]), each of the two defendants facing manslaughter charges defended by claiming that the other inflicted the fatal blows to the victim of their joint assault. Acknowledging the obvious hostility and conflict in the positions taken by defendants, the court found that "the prejudice which either appellant may have suffered from the testimony of the other is relatively slight. It is undisputed that each appellant participated in the incident. Consequently, it would only be natural for one to try to place the blame on the other. The jury had the responsibility of assessing each of the appellants' credibility. Moreover, the testimony of each appellant was merely cumulative of the government's case against the other and considering the simplicity of the case, there is no sound reason to suggest that members of the jury, being properly instructed as they were, could not realistically appraise the evidence against each appellant." (*Id.* at p.1128.)

(1b) As in *Turner*, *supra*, 37 Cal.3d 302, and *Brady*, *supra*, 579 F.2d 1121, it cannot be said here that the trial court abused its discretion in denying severance or that Boyde was denied a fair trial by the procedure employed. Although the defense positions might be characterized as antagonistic on the issue of the identity of the actual killer, it was undisputed that each defendant participated in the incident. Ellison's testimony—while critical as a percipient witness in placing the gun in Boyde's hand—only corroborated the other details of the offense established by Boyde's own extrajudicial statements and physical evidence presented by the prosecution. Ellison did not present the kind of extensive evidence against Boyde which



would have turned the trial into more of a contest between the defendants than between the prosecution and either of them, and his counsel made no arguments to the Boyde jury. No evidence inadmissible as to Boyde was introduced as a result of the joint trial; Boyde himself introduced Ellison's extrajudicial statements, and Ellison was available and fully cross-examined. (See *Nelson v. O'Neil* (1971) 402 U.S. 622 [29 L.Ed.2d 222, 91 S.Ct. 1723].) The prosecutor did not simply sit back and let the defendants convict each other; his case-in-chief against both successfully withstood the test of sections 1118 and 1118.1, and he aggressively cross-examined Ellison as well as Boyde.

Boyde's assertions of unfair prejudice are likewise unpersuasive. He claims that Ellison's status as a defendant-witness permitted the prosecutor to benefit from Ellison's accusation against Boyde while being relieved of the responsibility of informing the jury that the testimony contained perjury. But since the prosecutor did not present Ellison's testimony, he did not impliedly vouch for its credibility. Boyde's claim that Ellison's status as codefendant prevented discovery of a secret deal between Ellison and the prosecution must fail because of the lack of any factual support in the record that such a deal in fact was made. Boyde cannot complain that he was unfairly prejudiced by his testimony, when his case was damaged by his own lack of credibility as a witness. Although Boyde may have been surprised by Lucinda Taylor's testimony that he had an opportunity to return the gun to Ellison's mother's room, he did rebut it with testimony from Preston Scott that both were in Whittier at that time. Similarly, though Boyde may have been surprised by Otharean Owens's testimony—elicited on cross-examination by Ellison's counsel—that Boyde had admitted guilt, he was able to rebut this testimony with his own witnesses who denied that he made any affirmative reply to Ms. Owens. And although the prosecutor's remarks at Ellison's sentencing hearing acknowledge the importance of Ellison's testimony in establishing Boyde as the actual killer, there was nothing improper about this testimony at a joint trial.

B. Alleged "Secret Deal" Between Ellison and Prosecutor.

(4a) Boyde claims the prosecutor's failure to disclose an inducement given for Ellison's testimony constituted the suppression of substantial material evidence relating to the credibility of a key witness which denied him due process of law. (*People v. Ruthford* (1975) 14 Cal.3d 399, 406 [121 Cal.Rptr. 261, 534 P.2d 1341, A.L.R.4th 3132]; see also, *People v. Phillips* (1985) 41 Cal.3d 29, 45-49 [222 Cal.Rptr. 127, 711 P.2d 423].) Although Ellison was not called as a witness for the prosecution, and although no plea bargain was entered, Boyde asserts that Ellison's decision to waive jury and submit to a court trial and his decision to testify in his own defense were

prompted by an express or implied agreement that the prosecutor would not seek the death penalty against Ellison, and would agree that any special circumstances found true as to Ellison should be stricken.

(5) In *People v. Ruthford* we held that the duty on the part of the prosecution to disclose all substantial material evidence favorable to an accused extends to disclosure of evidence which relates to the credibility of a material witness and that the suppression of substantial material evidence, bearing on the credibility of a key prosecution witness constitutes a denial of due process within the meaning of the Fourteenth Amendment to the United States Constitution. (14 Cal.3d at pp. 406, 408.)

To demonstrate the existence of a "secret deal" between the prosecutor and Ellison, Boyde quotes from the statements of counsel and the district attorney made at the time of the jury waiver and later at Ellison's sentencing hearing.

On October 6, 1981, while hearing another motion pertaining only to Ellison, counsel announced that Ellison had elected to waive jury trial. The prosecutor joined in the waiver as to trial on guilt, special circumstances, and penalty. The prosecutor stated on the record "this is not a slow plea by any stretch of the imagination, and there are no concessions being made by either side, and it will be anticipated a fully contested trial down the line on the issue of guilt." The prosecutor also stated, "As the Court well knows, and since there will not be picking a jury, there will be no evidence presented in aggravation other than the facts of the crime and the special circumstances. [¶] While I—I'm not going to come out in court and concede something at this point in time—it suggests to me that at some point in time the law is going to require the Court—will not put the Court in a position to come back with a finding of death in this case. [¶] We would not be willing to waive jury to put you in that kind of a predicament in a case like this. [¶] I think it is not part of the negotiations for the jury waiver, or anything else. It is just an understanding that there will be no further evidence in aggravation, and that as I interpret the factors under 209 [sic] of the Penal Code, the Court will be required as a matter of law, to come back if, in fact, special circumstances are found, of course, with life without parole, and I wanted the Court to be aware of that." Ellison's counsel then commented that "Mr. Ellison will take part in the regular full-blown trial. There's been no concessions made by the District Attorney. In fact, it was after a little agonizing soul searching and conferences that my proposal to waive jury was accepted by him, and then I had to reconsider all the facets. [¶] We will take part in the trial. Evidence will be presented and Mr. Ellison will testify."



The court, in taking Ellison's waiver of constitutional rights, informed Ellison that under the court's prior rulings the special circumstances would be applicable even if he had not actively participated in the murder and that he therefore faced a potential sentence to prison for life without possibility of parole.

Boyde also points to statements made by Ellison's counsel in closing argument to the court: "This was a pretty unique case to me. I've defended a lot of them but never assisted in the prosecution of one and during this trial, I did have the opportunity to cross-examine Mr. Boyde and this sort of thing. [¶] Without Mr. Ellison, I think possibly Mr. Ellison's cooperation and assistance, I think possibly it would have been very difficult—maybe not impossible, but it would have been difficult to have a verdict of guilty come in on Mr. Boyde. [¶] But all those things aside, there was no plea bargain struck. Plea bargains are not struck in cases such as this. There was no plea bargain and no assurances made."

At the sentencing hearing on June 21, 1982, Ellison's counsel reiterated: "Mr. Ellison cooperated after he finally realized his uncle, Richard Boyde, the codefendant, was taking him down with intent. Mr. Ellison has been helpful. I believe that it would have been a great—there would have been a great deal of difficulty, not impossibility, but difficulty in convicting Mr. Boyde without Mr. Ellison's assistance. [¶] Mr. Ellison's testimony, I believe, was the turning point in making Mr. Boyde come forth and begin to show his true colors." Ellison's counsel thereupon urged the court to strike the special circumstances and the prosecutor agreed, stating: "In large part, I think Richard Boyde—the conviction of Richard Boyde—resulted probably, even perhaps unintentionally from the posture Mr. Ellison and his attorney took in this case. Had Mr. Ellison not waived jury and obviously streamlined the entire proceeding, the case could have been severed."

"I don't think the Boyde jury would have then heard Ellison's statements made to the police officers on tape. They would not have been able to compare Ellison's statements with Boyde's statements. They would not have had Boyde's testimony. . . . And once they got to see what Mr. Boyde was really all about, and they got to hear the respective knowledge about the facts of the case, that each of the two defendants had, it became clear that Mr. Boyde was the killer and more culpable."

"So Mr. Ellison has, perhaps not intentionally done a tremendous service to the People of the State of California by his posture in this particular case." The prosecutor also argued that Ellison was less culpable for the murder and concluded, "I believe that if this defendant is sentenced to a 25

to life sentence, rather than a Life Without Parole, justice will have been served, or at least not disserved."

(4b) The weakness of Boyde's argument lies in the fact that the record contains no direct evidence or admission of the existence of an agreement, but does contain express denials. While the facts recited by appellant would be consistent with the existence of an agreement, both the district attorney and defense counsel stated that no agreement had been made. The court never inquired on the record into the nature and extent of the discussions between Ellison and the district attorney leading to the mutual waiver of jury trial on guilt, special circumstances and penalty. Although Boyde's counsel was absent when the waiver was made, he did not raise the question on any other occasion and never suggested there had been a "secret deal." The district attorney's position regarding the appropriate sentence for Ellison remained consistent throughout the prosecution: he charged only Boyde with personal use of a firearm and had apparently determined that Boyde was the leader and actual killer.

The fact that Ellison later successfully moved to have his conviction reduced to second degree murder, pursuant to *People v. Dillon* (1983) 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 697], and that the district attorney at that time agreed the reduction would be appropriate, is not determinative either. The district attorney's position as to the relative culpability of the codefendants remained consistent.

On this record, we cannot conclude that there was an agreement between Ellison and the prosecutor which was not disclosed to Boyde.

C. Voluntaryity of Boyde's Statements.

Boyde challenges the admission of his various statements to the police, claiming they were not proved beyond a reasonable doubt to have been voluntarily given. (*People v. Jimenez, supra*, 21 Cal.3d 595.) Specifically, he argues that: (1) the January 22 statement in which he admitted knowledge of the 7-Eleven robbery-homicide was induced by an implied promise of leniency with regard to the charges arising out of the gas station robbery-kidnapping (*People v. Jimenez, supra*, 21 Cal.3d at pp. 611-612); (2) he did not waive his rights with regard to the offense of murder (see *U.S. v. McCrary* (5th Cir. 1981) 643 F.2d 323, 328); (3) the statement was given while he was in a state of extreme emotional upset and was not therefore the "product of a rational intellect and a free will" (*People v. MacPherson* (1970) 2 Cal.3d 109, 113 [84 Cal.Rptr. 129, 465 P.2d 17]; *In re Cameron* (1968) 68 Cal.2d 487, 498 [67 Cal.Rptr. 529, 439 P.2d 633]); (4) the January 23 statements in which he admitted involvement in the robbery-homicide

were the fruits of the earlier, involuntary statement (*People v. Braeseke* (1979) 25 Cal.3d 691, 703-704 [159 Cal.Rptr. 684, 602 P.2d 384]; and (5) the final statement on January 23, in which he confessed the 7-Eleven robbery was induced by police deception as to the legal consequences of his prior admission of some involvement (see *People v. Disbrow* (1976) 16 Cal.3d 101, 112, fn. 12 [127 Cal.Rptr. 360, 545 P.2d 272]).

(6) "It is axiomatic that the use in a criminal prosecution of an involuntary confession constitutes a denial of due process of law under both the federal and state Constitutions. [Citations.] In California, before a confession can be used against a defendant, the prosecution has the burden of proving that this was voluntary and was not the result of any form of compulsion or promise of reward. [Citations.]" (*People v. Jimenez, supra*, 21 Cal.3d at p. 602.) The prosecution bears the burden of proof, and the proof must establish voluntariness beyond a reasonable doubt. (*Id.* at p. 608.) At the trial level, the determination is made by the trial court outside the presence of the jury. (*People v. Jimenez, supra*, at p. 604.) The appellate court must examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was properly found. With respect to conflicting testimony, the appellate court accepts that version of the facts most favorable to the finding below, to the extent it is supported by the record. (*Id.* at p. 609.) Here the trial court found beyond a reasonable doubt all statements were voluntary.

1. Implied Promise of Leniency on Gas Station Charges.

(7) In general, a confession is considered voluntary "if the accused's decision to speak is entirely 'self-motivated' [citation], i.e., if he freely and voluntarily chooses to speak without 'any form of compulsion or promise of reward. . . .' [Citation.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 327-328 [165 Cal.Rptr. 289, 611 P.2d 883].) However, where a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law. (*People v. Brommel* (1961) 56 Cal.2d 629, 632 [15 Cal.Rptr. 909, 364 P.2d 845].) Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise, does not, however, make a subsequent confession involuntary. (*People v. Jimenez, supra*, 21 Cal.3d at p. 611.)

(8a) Boyde claims that his initial statement admitting knowledge of the Gibson robbery-homicide was induced by an implied promise that a statement would lead to more favorable disposition of the charges of robbery and kidnapping for robbery of Baker, for which he had been arrested.

Because Detective Callow admitted that he considered appellant a potential suspect in the Gibson homicide at the time of the January 22 interview regarding the Baker robbery-kidnapping, Boyde asserts the officer was motivated by a desire to obtain an incriminatory statement. Further, although Callow repeatedly informed Boyde that the police could not promise leniency but could only pass any information along to the district attorney who had the authority to make such an offer, Boyde argues Callow "made it crystal clear" that he had "no hope of anything other than incarceration" unless he gave a statement on the homicide. (See *In re Roger G.* (1975) 53 Cal.App.3d 198 [125 Cal.Rptr. 625].)

The argument is unpersuasive. The evidence shows that there was no promise of leniency, no attempt to induce a confession, and no confession. Appellant initiated discussion of the homicide because of his own hopes of obtaining leniency on the robbery-kidnapping charges. The statement he gave was neither a confession nor an admission, but an attempt to lay blame for the crime on "Big Mike" and Ellison. Detective Callow's role in eliciting the story was responsive rather than aggressive, and he repeatedly and clearly stated that he had no authority to make any promise of leniency regarding the pending robbery-kidnap charges, but could only pass information on to the district attorney.

The cases upon which Boyde relies are inapposite. In *In re Roger G.*, *supra*, 53 Cal.App.3d 198, for instance, officers engaged in a lengthy effort to induce a minor to abandon his claim of innocence of a shooting for which he had been arrested. They told him he might be incarcerated for "seven or eight or ten or life, you know . . ." and said, ". . . it's gonna help you out for a chance of probation or getting parole if you are honest about the thing. . . . [but] if you go in there . . . and . . . try to cover up, do you think we'd give you a chance at probation or parole? No way." Although they subsequently stated they could not promise probation or parole, that it was only a possibility, the appellate court found the evidence established an "implied, if not express threat of harsher punishment if Roger did not confess, and an implied, if not express, promise of the possibility of more lenient treatment if he did." (*Id.* at pp. 200-202.) And although dictum in *People v. Nelson* (1964) 224 Cal.App.2d 238 [36 Cal.Rptr. 385] indicates that a confession to crimes for which defendant was arrested might be involuntary if induced by promises of lenient treatment on an unrelated pending charge, that is not the factual posture of appellant's case.

At the time of his January 22 statement Boyde made a voluntary, if unwise, decision to offer false information in hope of obtaining favorable treatment. The trial court's determination that the statement was voluntary beyond a reasonable doubt is correct.



2. Failure to Inform Appellant He Was Suspected of Murder.

(9) Boyde argues that the failure to inform him he was a suspect in the robbery-murder rendered his January 22 statement involuntary because his decision to waive his rights to remain silent and to consult counsel was not made knowingly, intelligently and voluntarily. He acknowledges that no California decision had held that *Miranda* warnings (*Miranda v. Arizona*, *supra*, 384 U.S. 436) must specify the actual charge pending against the person being interrogated and that the Court of Appeal rejected such an argument in *People v. Neely* (1979) 95 Cal.App.3d 1011, 1017 [157 Cal.Rptr. 531]. He also acknowledges that the Court of Appeal has held that new *Miranda* warnings are not necessarily required whenever an interrogation about one crime leads to discussion of another. (*People v. Schenk* (1972) 24 Cal.App.3d 233, 236 [101 Cal.Rptr. 75].)

He urges that the position taken by a minority of courts which require such information to implement *Miranda* is the better approach. Boyde relies upon *United States v. McCrary*, *supra*, 643 F.2d 323, *Schenk v. Ellsworth* (D.C.Mont. 1968) 293 F.Supp. 26, and *Commonwealth v. Dixon* (1977) 475 Pa. 17 [379 A.2d 553]. The argument does not fit the facts of this case. On January 22 Boyde volunteered information about these crimes, and as noted above, admitted no complicity but claimed to know that others had committed the offenses. This statement was damaging because it led directly to the later statements in which Boyde admitted his guilt, but was incriminating only by comparison to those later statements.

3. Boyde's Capacity to Make a Knowing and Voluntary Waiver.

(10) Boyde asserts that his January 22 statement was taken within minutes after he was removed from the holding cell "because he was completely unnerved by an apparent attack of claustrophobia, and in terror of being incarcerated in the Riverside County Jail." He cites Detective Callow's description of his "very hyper, very nervous condition" to show that his decision to give a statement was not "the product of a rational intellect and a free will." (*People v. MacPherson*, *supra*, 2 Cal.3d at p. 113; *In re Cameron*, *supra*, 68 Cal.2d at p. 498.)

The evidence does not indicate Boyde was so distraught that his will to resist confession was overborne. Detective Callow testified that Boyde seemed to calm down after being removed to an interview room and being given coffee and a cigarette. Boyde presented no contradictory evidence. There was no indication of intoxication or mental illness.

4. *The January 23 Statements as Fruit of the January 22 Statement.*

(8b) This argument falls with the conclusion that the January 22 statement was voluntarily given.

5. *January 23 Confession Induced by Misrepresentation of Detectives Lund and Ropac.*

When Detectives Lund and Ropac approached Boyde on January 23 they first told him they thought the story he told Callow was not truthful. They asked if he was willing to talk with them again about the robbery-homicide and when he indicated he would, took a full *Miranda* waiver. Boyde then told his second story. He admitted he had been with Ellison and Big Mike at the 7-Eleven, that Big Mike had pulled the robbery and that he (Boyde) had driven the car from the store to the orange grove. But he claimed he did so under protest, denied assisting in the killing and denied any advance knowledge of Big Mike's intent to rob or kill.

(11) Boyde claims that at the conclusion of this statement Lund told him it amounted to a full confession, that he believed Boyde had in fact been more deeply involved than he had admitted, and that any further statement could not result in any greater liability than he had already incurred. After this confrontation Boyde told his final version, which implicated him at least as an accomplice in the robbery and felony murder. Boyde contends this incriminating statement was induced by Lund's misrepresentation as to the legal effect of the prior statement, and that this deception amounts to psychological coercion which rendered the statement involuntary. (See *People v. Hogan* (1982) 31 Cal.3d 815, 840-841 [183 Cal.Rptr. 817, 647 P.2d 93].)

Boyde's description of the encounter is factually inaccurate. The transcript of the interview shows that at the conclusion of the "I was just along for the ride" story, Lund stated: "I'll tell you the problems I'm having, and, and I'm no lawyer, but I would think . . . what bothers me is you, you got such great detail, you sure you weren't in the store? You sure you didn't walk in?" Boyde repeated he had not gone in. Lund continued questioning whether Boyde might have been in the doorway of the store and whether he could have seen the money go into the bag or heard Big Mike saying it was a robbery without having been in the store. Finally, Lund stated: "It doesn't make no difference whether you were sitting in the car the whole time or whether you were right in Big Mike's back pocket, you're, you're involved in this the same, if everything else is the truth. . . ."

While Lund made it clear he believed appellant was more deeply involved in the crimes than he was admitting, he did not tell Boyde that his prior statement amounted to a confession or that any further statement could not result in any greater liability. Lund's statements amounted to harsh questioning, but did not rise to the level of psychological coercion or misrepresentation of the legal consequences of appellant's prior statement.

D. *Admission of Prior Conviction.*

The prosecutor offered evidence of the circumstances of appellant's 1976 robbery and kidnapping of Lou Creech pursuant to Evidence Code section 1101, subdivision (b) to show appellant's identity as the perpetrator of the Baker offenses, to show his identity as the dominant figure in the Gibson robbery-murder, to show that appellant participated in the Gibson offenses with the intent to commit robbery and kidnapping for robbery, and to show that appellant had a motive for killing Gibson. The trial court found that the prior and charged offenses shared a sufficient number of distinctive common marks to establish a unique modus operandi, that the evidence of modus operandi was relevant to the material issue of appellant's identity as the perpetrator of the Baker robbery-kidnapping, and that the evidence was relevant to show Boyde's intent, if he was found to be an aider and abettor in the Gibson incident, or, alternatively, to show that he was the leader in the perpetration of that crime.

(12) Boyde contends the 1976 and 1981 7-Eleven offenses lacked sufficient common, distinctive marks to establish a modus operandi, that the evidence was merely cumulative on the question of the identity of the participants in the Gibson offenses, that the evidence had no significant probative value regarding the identity of the actual killer of Gibson, and that the trial court failed to properly weigh the prejudicial effect of the prior crimes evidence against its probative value pursuant to Evidence Code section 352.

We need not determine the merits of this contention since it is clear that any error in admitting the evidence was harmless. There is no reasonable probability that Boyde would have obtained a more favorable result had the evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) Boyde's defense was damaged beyond repair, even without consideration of the prior crime, by Ellison's testimony, inferences from the placement of the footprints in the orange grove, and Boyde's extensive knowledge of the details of the robbery and shooting.

E. *Erroneous Jury Instruction.*

(13) Boyde claims the trial court erred in giving CALJIC No. 2.27—which permits proof of any fact by the testimony of a single witness⁴ in this case where critical evidence on a central issue came from an accomplice whose testimony is required by law to be corroborated (§ 1111; CALJIC Nos. 3.11, 3.18). Although the court also instructed on the principles that an accomplice's testimony should be viewed with caution (CALJIC No. 3.18), that a defendant cannot be convicted on the testimony of an accomplice unless that testimony is corroborated (CALJIC No. 3.11), and that if anyone committed the robbery, kidnapping and murder Ellison was an accomplice as a matter of law, Boyde claims No. 2.27 effectively nullified these instructions.

This claim is unpersuasive. Although Boyde is correct that use of No. 2.27 is discouraged in cases where one witness's testimony requires corroboration (see use note to CALJIC No. 2.27 (4th ed. 1979)), so long as the appropriate instructions on the use of accomplice testimony are given, the giving of No. 2.27 is not error. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 333 [190 Cal.Rptr. 211]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 974-975 [193 Cal.Rptr. 799].)

F. *Carlos Error.*

(14) Boyde contends that the court prejudicially erred under *Carlos v. Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], in failing to instruct the jury that it could not find the felony-murder special circumstances true unless it found that defendant intended to kill at the time of the homicide. His contention must be rejected.

In *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], we held that, with respect to the actual killer, the court need not instruct on intent to kill in connection with felony-murder special circumstances. Such an instruction is required only when there is evidence from which the jury could find that the defendant was an accomplice rather than the actual killer. Although an instruction was warranted on the basis of Boyde's testimony that he was not the killer, the error in failing to give it was cured by the jury's special verdict that Boyde "personally killed Dickie Lee Gibson with express malice aforethought and premeditation and deliberation."

⁴CALJIC No. 2.27 provides: "Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact [required to be established by the prosecution] to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends."

Boyde nevertheless argues that he should not be bound by this finding because he did not have reasonable advance notice that the special verdict would be presented to the jury. We do not agree. Boyde argued throughout pretrial proceedings that it would be unconstitutional to impose the death penalty in the absence of proof that he actually killed or intended that a killing occur. He addressed the issue in his defense testimony by denying any knowledge or intent that a killing would occur. Thus he was neither unfairly surprised nor denied an opportunity to present all the evidence at his command on the issue of intent. The trial court instructed the jury on premeditated and deliberate murder and malice aforethought, as well as felony murder; all of the elements of the special verdict were explained to the jury.

IV. JURY SELECTION ISSUES

A. *Challenge to Death-qualification of Guilt Phase Jury.*

(15) Boyde claims that removal from the guilt phase jury of 11 persons who would automatically vote against death at the penalty phase but who could render an impartial verdict on the issue of guilt or innocence violates the constitutional requirement that his jury be drawn from a fair cross-section of the community and his constitutional right to trial by an impartial jury. These claims have been rejected by both this court and the United States Supreme Court. (*Lockhart v. McCree* (1986) 476 U.S. 162 [90 L.Ed.2d 137, 106 S.Ct. 1756]; *People v. Fields* (1983) 35 Cal.3d 329, 374 [197 Cal.Rptr. 803, 673 P.2d 680] (Kaus, J., conc.); *Hovey v. Superior Court* (1980) 28 Cal.3d 1 [168 Cal.Rptr. 128, 616 P.2d 1301].)

B. *Use of Peremptory Challenges to Exclude Persons With Reservations About the Death Penalty.*

(16) Boyde argues that the prosecutor's use of peremptory challenges on all prospective jurors with reservations about the death penalty denied him an impartial jury on the issue of penalty and constituted group bias in violation of *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748]. We have previously rejected this argument in *People v. Zimmerman* (1984) 36 Cal.3d 154, 160-161 [202 Cal.Rptr. 826, 680 P.2d 776] and *People v. Turner, supra*, 37 Cal.3d at pages 313-315.

C. *Witherspoon Error.*

(17a) Boyde contends that three jurors were improperly excused under *Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770]. He asserts that the jurors had not made it "unmistakably clear" that they

"would automatically vote against the imposition of capital punishment without regard to the evidence that might be developed at the trial" (*Id.* at p. 522, fn. 21 [20 L.Ed.2d at p. 785].) The United States Supreme Court recently modified the *Witherspoon* standard in *Wainwright v. Witt* (1985) 469 U.S. 412 [83 L.Ed.2d 841, 105 S.Ct. 844], and we adopted that modification in *People v. Ghent* (1987) 43 Cal.3d 739, 767-769 [239 Cal.Rptr. 82, 739 P.2d 1250]. (18) The new standard is whether a juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (469 U.S. at p. 424 [83 L.Ed.2d at pp. 851-852].) "[I]n addition to dispensing with *Witherspoon's* reference to 'automatic' decisionmaking, this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." (*Ibid.* [83 L.Ed.2d at p. 852].) Our task on review is to examine the context surrounding the juror's exclusion to determine whether the trial court's decision that the juror's beliefs would "substantially impair the performance of his duties as a juror" is fairly supported by the record. (*Darden v. Wainwright* (1986) 477 U.S. 168, — [91 L.Ed.2d 144, 153-154, 106 S.Ct. 2464, 2469].)

1. Prospective Juror Warren.

(17b) Although prospective juror Warren gave some seemingly equivocal answers earlier, his final answer was quite clear. The court asked Warren whether he could "under any circumstances return a verdict that would result in the death penalty for Mr. Boyde or anyone." Warren responded, "I can't do it, sir." He was then excused for cause. His excusal was proper under either the *Witt* or *Witherspoon* standard.

2. Prospective Juror Bennett.

Prospective juror Bennett was initially unclear as to whether he was unequivocally opposed to the death penalty. His later responses, however, revealed his clear opposition to the death penalty. In reply to questions from both defense counsel and the prosecution about whether he would impose the death penalty if he found that the evidence in aggravation outweighed the evidence in mitigation, he stated that he would not, regardless of the severity of the evidence in aggravation. Prospective juror Bennett also said he could think of no circumstance where he could personally vote for the death penalty. He was thereafter excused. The record supports the trial court's excusal in that it demonstrates that prospective juror Bennett's views would "substantially impair the performance of his duties as a juror

in accordance with his instructions and his oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424 [83 L.Ed.2d at pp. 851-852].)

3. Prospective Juror Warne.

Prospective juror Warne testified to having "mixed feelings" about the death penalty, and stated, "I don't know that taking a life is a proper form of punishment." When asked whether she personally could return a verdict that would result in the death penalty, she responded, "No, I don't think so." She stated that the way she felt "right now" was that she would not under any circumstances return a death verdict. She further stated that her ideas might change, that she had no way of knowing if they would, but that she was not convinced that taking another life "is the way to go."

Defense counsel then sought to explain the balancing of aggravating factors against mitigating factors, but gave an explanation later determined to be inaccurate in *People v. Brown* (1985) 40 Cal.3d 512 [220 Cal.Rptr. 637, 709 P.2d 440] (rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]). Counsel stated that if a juror weighed the evidence and determined that the evidence in aggravation outweighed the evidence in mitigation, "the law mandates that you come in with a finding of death, no matter what your personal feelings may be." Under those circumstances he asked if she could impose a death penalty, and Ms. Warne replied, "No, I don't think I could."

In response to the district attorney, Ms. Warne stated that she could perhaps conceive of voting for death if a crime were committed against one of her children, but could think of no other situation. Finally, the district attorney reiterated that the law requires a death verdict where aggravation outweighs mitigation, "even if you personally don't think the crime is worth it. . . ." and asked whether she would be able to follow her oath as a juror and return the verdict. She replied that she could not: "No, couldn't do it. I would have to disobey."

Prospective juror Warne's responses indicated that she would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522, fn. 21 [20 L.Ed.2d at p. 785].) The only situation in which she would be willing to vote for the death penalty was one which she would never encounter, since she would never be permitted to be a juror in a case involving a crime against her child. The fact that defense counsel and the prosecutor may have misstated the decisionmaking process under *People v. Brown*, *supra*, 40 Cal.3d 512, does not alter our conclusion. The question at hand was whether prospective juror Warne would be willing to

follow the law and vote to impose the death penalty in an appropriate case. She indicated that she would not, and that qualified her for excusal under *Wainwright v. Witt*, *supra*, 469 U.S. 412.

V. PENALTY PHASE ERROR

A. Facts.

1. Prosecution Evidence.

As evidence in aggravation, the prosecutor presented testimony by victims of past offenses committed by defendant, testimony by Boyde's California Youth Authority (CYA) parole officer as to his conduct while on parole, and evidence of Boyde's plan to escape from jail during the trial of the instant charges.

Katherine Hagen testified that Boyde robbed her on June 26, 1976, while she was working at the Circle K Market in Riverside. Mark Page testified that he was robbed by Boyde on July 15, 1976, while he was working at a 7-Eleven store on Pine Street in Riverside. Tim Hanks testified that Boyde robbed him on July 16, 1976, while he was working at a 7-Eleven store on Wells Street in Riverside. Charles Skalf testified that he was robbed by Boyde on July 19, 1976, at a Winchell's Donut store. Edward Wall testified that Boyde robbed him on July 19, 1976, at a 7-Eleven store on Van Buren Street in Riverside.

Colleen Dietzman and Karen Smith testified that Boyde participated in an assault on them at Ramona High School in 1974. Mary Matlock testified that Boyde was in a group which was throwing bricks at her car in 1974.

Robert Gomez, Boyde's CYA parole officer, testified that Boyde was committed to CYA in 1972 on charges which included escape from juvenile hall and receiving stolen property. Boyde was recommitted in 1974 for assault and throwing an object at a vehicle. Gomez stated that Boyde failed to report for required meetings, failed to make diligent effort to find work, and generally failed to make "any offer to rehabilitate himself or engage in any kind of productive conduct."

Testimony from three police officers regarding their contacts with Boyde included information about Boyde's untruthfulness (Detective Smith), Boyde's possession of stolen property (Detective Knofflock), and his possession of marijuana in jail (Deputy Nelson).



Evidence of Boyde's escape plan consisted of two letters he had written and testimony by two fellow jail inmates that Boyde planned to escape from the roof of the jail and use a gun to subdue the guard if necessary. Although the plan never ripened into an attempted escape, the trial court permitted the evidence on the theory that Boyde and Cecil Moore had entered into a conspiracy to effect Boyde's escape.

Ronnie English, who was serving a jail term for assault, testified as follows: He became friendly with Moore while working in the jail kitchen. Moore had known both Ellison and Boyde for a long time. English saw Moore read a letter he had received from Boyde and, at Moore's request, helped him read the letter and a map. He discussed the plan with Moore, and Moore told him that he was going to help Boyde. English saw Moore receive a second letter from Boyde. After the second letter Moore told him he wanted no part of Boyde's plan to kill the deputy. Therefore he would just leave the gun and the wirecutters on the roof, but he would not wait on the roof all night as Boyde requested. English reported the letters to jail authorities who then photocopied them and returned them to Moore's cell. English was never part of the conspiracy.

Moore testified that he had talked with Boyde about the escape plan before receiving the letters. Although he had told Boyde he would help him, he changed his mind when he read the first letter which talked about killing the deputy. Later, however, on cross-examination Moore said that from the start he had never intended to help Boyde escape.

Deputy Baker, who was familiar with Boyde's handwriting from her censorship of his mail, identified the handwriting on the two letters as Boyde's. Sargent Zavetz testified that English had passed the escape plan letters to him and corroborated information in the letters about the jail routines and layout.

To fend off the prosecutor's offer to produce a parolee who had allegedly purchased a gun for use in the escape, Boyde's counsel stipulated that the publication of the letters would constitute an overt act for purposes of establishing the conspiracy.

2. Defense Evidence.

Boyde presented testimony by his mother, two sisters, stepfather, ex-girlfriend and her mother, and his wife. His family was poor; he did not know his father, his mother had little education and worked as a domestic. Boyde had health problems from a young age and did poorly in school. As a young teenager he began to skip school, stay out late, and have trouble with the

police. The family was not able to obtain counseling through the school system and could not afford to do so privately. Boyde had few friends and was uncomfortable with the strictness of his stepfather who came into the home when he was eight. Boyde's former girlfriend and his sister both testified that they found him to be a giving person, good with children and good to them. His wife testified that he had looked hard for work after his release from prison in November 1980, but his efforts were unsuccessful. She married him after his arrest for these crimes and was shocked at the crimes he was accused of because it seemed so unlike him.

A psychologist testified that Boyde has an inadequate personality with limited internal resources and low self-esteem. He is often depressed and is socially isolated. Boyde's intelligence level is on the edge between dull-normal and borderline.

B. Improper Evidence in Aggravation.

(19a) Boyde correctly contends that certain evidence was improperly admitted because it did not relate to any of the statutory aggravating factors. (See *People v. Boyd* (1985) 38 Cal.3d 762 [215 Cal.Rptr. 7, 700 P.2d 782].) Most of the evidence presented about Boyde's CYA commitment and parole falls into this category in that it did not pertain to a prior felony conviction (§ 190.3, subd. (c)) or criminal activity involving force or violence (§ 190.3, subd. (b)). The same may be said for testimony by officers about Boyde's untruthfulness, possession of stolen property and possession of marijuana in jail. Also improper was testimony by victims of other offenses about the impact that the event had on their lives.³

Evidence of two other incidents was improperly admitted because the prosecution had failed to give proper notice, as required by section 190.3. Those incidents were the 1974 assault on Colleen Dietzman and Karen Smith and the 1976 robbery of Edward Wall.

(20) We do not agree, however, with Boyde's contention that evidence of the escape plan was improperly admitted. Contrary to Boyde's claim, violent criminal activity need not have preceded the charged crimes to be admissible under section 190.3, subdivision (b). (See *People v. Balderas*

³The testimony also was arguably improper under *Booth v. Maryland* (1987) 482 U.S. — [96 L.Ed.2d 440, 107 S.Ct. 2529], which condemned the admission of detailed testimony at the penalty phase by family members regarding the impact that the victim's death had had on their lives. Unlike *Booth*, the testimony here was by the actual victims themselves who in the course of describing Boyde's criminal conduct also mentioned the effect it had on them. The improper testimony was far more fleeting than that in *Booth* and, in our view, could not have affected the verdict.

(1985) 41 Cal.3d 144, 202 [222 Cal.Rptr. 184, 711 P.2d 480].) The plan called for use of a gun to subdue the guard if necessary and thus met the force or violence requirement for admissibility under subdivision (b). The remaining question is whether the evidence revealed the technically complete crime of conspiracy to qualify as "criminal activity" under subdivision (b). (See *People v. Phillips*, *supra*, 41 Cal.3d at p. 72.)

Boyde contends that a technically complete crime was not shown because there was no independent evidence of the agreement and no overt act in furtherance of the conspiracy was established. (See Evid. Code, § 1223; *People v. Leach* (1975) 15 Cal.3d 419, 430-431, fn. 19 [124 Cal.Rptr. 752, 541 P.2d 296].) He is mistaken. He stipulated that the sending of the letters constituted the overt act. As to the agreement, Moore's actions are sufficient circumstantial evidence to show the agreement since all that is necessary is a prima facie showing before consideration of coconspirator's admissions. (See *People v. Jourdain* (1980) 111 Cal.App.3d 396, 404-406 [168 Cal.Rptr. 702]; *People v. Perez* (1978) 83 Cal.App.3d 718, 728-730 [148 Cal.Rptr. 90].) Here we have Moore's receipt of Boyde's letter, his reading and studying it with English, their discussion of the maps and plans, and Moore's receipt of the second letter. Moore told English after receipt of the first letter that he was going to help Boyde. The fact that Moore testified that he never planned to help Boyde does not nullify the other evidence of his agreement; it merely went to the weight of the evidence for the jury to consider in determining whether the conspiracy had been proved beyond a reasonable doubt. The instructions on conspiracy were sufficient; sua sponte instructions on the elements of the offense were not required. (See *People v. Phillips*, *supra*, 41 Cal.3d at p. 68.)

(19b) The evidence that was improperly admitted in aggravation was relatively insignificant in light of the properly admitted evidence of Boyde's commission of a string of four robberies in 1976, his involvement in the brick-throwing incident in 1974, and his conspiracy to escape from the jail while the current charges were pending. We therefore conclude that the improperly admitted evidence could not have affected the verdict or have misled the jury in its penalty determination.

C. Jury Instructions.

1. Factor (k).

The court gave the complete version of CALJIC No. 8.84.1 as it read before its amendment in response to our suggestion in *People v. Easley* (1983) 34 Cal.3d 858, 878, footnote 10 [196 Cal.Rptr. 309, 671 P.2d 813], for clarification of the subdivision (k) factor of section 190.3 (hereafter

referred to as factor (k)). The version of factor (k) that was given read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CALJIC No. 8.84.1 has since been amended to add the following phrase to factor (k): "and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (1986 rev.)

(21) Boyde contends that the unadorned version of factor (k) that was given may have misled the jury into thinking it could not consider evidence relating to his background and character. We do not agree. The jury was instructed to consider "all of the evidence which has been received during any part of the trial of this case." All of the defense evidence at the penalty phase related to Boyde's background and character. Although the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence could not be considered. Defense counsel argued at length for giving great weight to defendant's troubled background and personality deficiencies and referred to factor (k) as the catchall provision. It is inconceivable the jury would have believed that, though it was permitted to hear defendant's background and character evidence and his attorney's lengthy argument concerning that evidence, it could not consider that evidence.

2. Antisymphony.

(22) No antisymphony instruction (CALJIC No. 1.00) was given at the penalty phase, but it was given at the guilt phase. For reasons stated above, we do not think that a reasonable juror would have believed he was not allowed to consider sympathy for the defendant at the penalty phase. Although the prosecutor argued against basing the weighing process on "emotion, sympathy, pity, anger, hate or anything like that because it is not rational if you make a decision on that kind of basis," the thrust of his argument was to implore the jury to make a reasoned decision, to rationally evaluate the evidence.

3. Failure to Edit CALJIC No. 8.84.1.

(23) Boyde contends the court should have deleted all inappropriate mitigating factors from the instruction. We rejected an identical claim in *People v. Ghent*, *supra*, 43 Cal.3d 739, 776.

(24) Boyde also contends the trial court should have modified the instruction to make it clear that section 190.3, subdivision (c) applied only to items that were not already covered by subdivisions (a) and (b). We dis-



cussed a similar claim in *People v. Melton* (1988) 44 Cal.3d 713, 764-765 [244 Cal.Rptr. 867, 750 P.2d 741], and concluded that although subdivision (a) ("circumstances of the crime of which the defendant was convicted in the present proceeding") is limited to the charged crimes whether or not violent, subdivisions (b) (violent criminal activity) and (c) (prior felony convictions) may properly overlap when a prior felony conviction involved force or violence. Thus the only clarification called for was that the charged crimes should be considered only under subdivision (a). We do not believe, however, that a reasonable jury would have considered the circumstances of the crime more than once.

4. Excessive Special Circumstances.

(25) Boyde contends that the trial court erred in submitting both the robbery and kidnapping-for-robbery special circumstances to the jury because the offenses were committed as part of a single, indivisible course of criminal conduct. We rejected a virtually identical claim in *People v. Melton*, *supra*, 44 Cal.3d 713, 765-769.

5. Instruction on Weighing Aggravating and Mitigating Circumstances.

(26) The jury was instructed in the language of section 190.3 (former CALJIC No. 8.84.2) as follows: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." Boyde contends that the jury was thereby misled as to its role in determining the appropriateness of the death penalty.

In *People v. Brown*, *supra*, 40 Cal.3d at pages 538-545, we concluded that the directive of section 190.3 that the trier of fact "shall impose a sentence of death" if it "concluded that the aggravating circumstances outweigh the mitigating circumstances" did not impermissibly restrict the jury's constitutional sentencing discretion. We rejected the defendant's proffered mechanistic construction of the words "outweigh" and "shall" in favor of one which directed the jury to weigh the various factors and determine under the relevant evidence which penalty is appropriate in a particular case. We noted, however, that the statutory language—particularly the words "shall impose"—left room for confusion about the jury's role and therefore directed courts in the future to instruct on the scope of the jury's discretion. As to cases tried before our opinion, we concluded that each must be examined on its own merits to determine whether the sentencer may have been misled to the defendant's prejudice regarding the scope of its sentencing discretion. (*Id.* at p. 544, fn. 17.)

Our concerns in *Brown* were essentially two: The first was that the jury might be confused about the nature of the weighing process, that it is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process. Our second concern was that use of the word "shall" might mislead the jury as to the substance of the ultimate determination it was called upon to make. In *Brown*, we concluded that the statutory language "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case." (40 Cal.3d at p. 541.)

In the present case, both the prosecutor and defense counsel repeatedly told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. They also made it clear that the jury was free to assign whatever weight it wanted to any particular factor. Although the prosecutor argued that the jury was obliged (i.e., it "shall") to return a death verdict if it found that the aggravating factors outweighed the mitigating even slightly, he also told the jury that its ultimate determination was: "Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty." In his final summation, the prosecutor stated, "and the point now becomes, and the only question is, should it [the death penalty] be or should it not be imposed." Defense counsel also made it clear the ultimate penalty was the jury's choice: "Can (k) outweigh (a) through (j)? If you find that it does, it does, and that is your choice. That is what we are asking you to do."

In our view, the *Brown* concerns were satisfied here. The jury was clearly informed that the word "weigh" did not connote mere counting, but rather involves a qualitative judgment. The jury was also adequately informed as to its discretion in determining whether death was the appropriate penalty. Obviously, when jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they necessarily understand they have discretion to determine the appropriate penalty. The task of assigning weights to factors is not an arid exercise performed in a vacuum; it is the very means by which the jury arrives at its qualitative and normative decision as to the appropriate penalty. We recognized this in *Brown*, where we explained: "Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor 'k' as we have interpreted it. [Fn.] By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating, the statute should not



be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. *Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.*" (40 Cal.3d at p. 541, italics added.)

The dissent, however, seems to assume that the jury must go through two separate assessments in arriving at a penalty determination. This assumption is unfounded. As we explained in *Brown*, the jury makes its appropriateness determination during its normative weighing process. Then, based upon its determination of the weight of mitigating factors relative to aggravating factors, it chooses the appropriate penalty—life without possibility of parole if mitigating circumstances outweigh aggravating, or death if aggravating circumstances outweigh mitigating. This is explained in the 1986 revision of CALJIC No. 8.84.2, which states in pertinent part: "In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

Relying on the prosecutor's reference to the statutory "shall," the dissent concludes that this particular jury likely believed that its discretion and responsibility to assign weight to the various factors existed independently of and apart from any responsibility to determine penalty. Support for this proposition is purportedly found in the prosecutor's comments during individual, sequestered voir dire—comments directed to determining whether a prospective juror could, if the circumstances warranted it, discharge his responsibility in the penalty phase of the trial to impose the appropriate penalty.* The dissent thus adopts the novel view, unsupported by any cited authority, that remarks made by the prosecutor before trial to unsworn jurors during individual voir dire—which jurors have not yet been instructed on the law by the court—carry forward to create reversible error in the penalty phase of trial.

The dissent also mistakenly faults the prosecutor for urging the jurors to base their decision on the evidence presented as measured by the guidelines

*The comments, in any event, have been magnified by the dissent. Each was a result of the prosecutor's contrasting the current death penalty law with the former one that was unconstitutional for lack of standards governing the jury's exercise of discretion in sentencing. (See *Furman v. Georgia* (1972) 408 U.S. 238 [33 L. Ed. 2d 346, 92 S.Ct. 2726].) He was attempting to explain that the current law does not leave jurors "rudderless," but instead provides concrete standards to guide the jury's exercise of discretion.

set forth in the court's instructions rather than by simply consulting their personal feelings. The prosecutor's exhortations did no more than urge the jurors to limit the "sentencing considerations to record evidence," a completely proper request according to the United States Supreme Court in *California v. Brown*, *supra*, 479 U.S. at page — [93 L.Ed.2d at p. 941]. We find no impropriety in such argument. It is a misinterpretation of the prosecutor's argument to assert, as the dissent does, that he was telling the jury it had no discretion to determine the appropriate penalty. We conclude that the jury was adequately informed that the manner in which it weighed mitigating versus aggravating circumstances was in its sole discretion and that it thereby determined whether death was appropriate.

D. *Constitutionality of 1978 Death Penalty Law.*

Boyde contends that the 1978 death penalty law violates the Eighth Amendment's proscription of "arbitrary" sentencing procedures because it does not provide adequate safeguards to protect against arbitrary death judgments. He also argues the 1978 law is unconstitutional in various other respects. Each of his constitutional arguments has been considered and rejected in recent opinions. (See e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113].)

E. *Prosecutorial Misconduct.*

(27) The prosecutor asserted during closing argument that the absence of a mitigating circumstance constituted aggravation. Although we stated in *People v. Davenport* (1985) 41 Cal.3d 247, 290 [221 Cal.Rptr. 794, 710 P.2d 861], that such argument "should not in the future be permitted," we did not rely on the point in reversing the penalty judgment. The trial in this case took place in 1982, well before our *Davenport* opinion. The argument here occurred only once at the outset when the prosecutor went through the list of aggravating and mitigating factors in light of the evidence presented. Though erroneous, we do not believe the prosecutor's argument can be deemed to have misled the jury. The trial court had instructed the jury to consider the sentencing factors only "if applicable." We generally presume that the jurors follow the court's instructions, and we are presented with no reason to believe that the jurors did not do so.

F. *Ineffectiveness of Counsel.*

(28) Boyde claims that his trial counsel was ineffective for failing to object to the escape evidence and the evidence in aggravation for which proper notice had not been given. His claim is unavailing since we have reviewed the matters cited on their merits and found no prejudicial error.

(See *People v. Fosselman* (1983) 33 Cal.3d 572, 584 [189 Cal.Rptr. 855, 659 P.2d 1144].)

G. *Application for Modification of Judgment.*

In every case in which a death penalty is returned, section 190.4, subdivision (e) requires the trial judge to make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law. (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 792.) The judge must "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances . . . and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings." (§ 190.4, subd. (e).)

(29) Boyde contends the court's denial of the motion to modify the judgment was based on its erroneous belief that the evidence he presented at the penalty hearing did not constitute mitigation. He points to the court's statement: "There is little, if anything, that can be said in way of mitigation against imposition of the death penalty, but there are many factors in aggravation. . . ." In context, however, the court's statement was merely a reference to the weight he thought should be given the mitigating evidence. The court never indicated it thought the evidence could not be considered.

H. *Correction of Abstract of Judgment.*

Boyde contends, and the Attorney General agrees, that the abstract of judgment and minute order should be corrected to conform to the oral judgment pronounced on count II (kidnapping for robbery) of life imprisonment with possibility of parole, with sentence on that count stayed pending appeal.

VI. *DISPOSITION*

The judgment is affirmed in its entirety. The abstract of judgment is ordered corrected to conform to the oral judgment pronounced as to count II (kidnapping for robbery) of life imprisonment, with execution of sentence on that count stayed pending execution of the sentence of death.

Lucas, C. J., Eagleson, J., and Kaufman, J., concurred.

ARGUELLES, J., Concurring and Dissenting.—I concur in the majority opinion insofar as it affirms the judgment of guilt and the special circumstance findings but respectfully dissent insofar as it affirms the penalty judgment. In my view, the record in this case, taken as a whole, demonstrates that the jury was misled with regard to the nature of its task and the scope of its discretion at the penalty phase of the trial. (See *People v. Brown* (1985) 40 Cal.3d 512, 538-544 [220 Cal.Rptr. 637, 709 P.2d 440]; *People v. Milner* (1988) 45 Cal.3d 227, 253-258 [246 Cal.Rptr. 713, 753 P.2d 669].) Accordingly, I would reverse the penalty judgment and remand for a new penalty trial before a properly advised jury.

I

In instructing the jury at the conclusion of the penalty phase, the trial court, after enumerating the various aggravating and mitigating factors contained in the 1978 death penalty law, advised the jury: "It is now your duty to determine which of the two penalties, death or confinement in the State Prison for life without possibility of parole shall be imposed on the Defendant. [¶] After having heard all of the evidence and having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the State Prison for life without the possibility of parole." (Italics added.) The court gave no further instructions either elaborating on the scope of the jury's discretion or explaining that, in weighing the aggravating and mitigating circumstances, the jury must make its own normative judgment of whether death or life without possibility of parole is the appropriate punishment under all the circumstances.

In *Brown, supra*, 40 Cal.3d 512, 538-544, this court recognized that the wording of the instruction which the trial court gave in this case, although tracking the language of the 1978 statute, "leave[s] room for some confusion as to the jury's role" in determining the appropriate penalty. (40 Cal.3d at p. 544, fn. 17.) In *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277 [232 Cal.Rptr. 849, 729 P.2d 115], we explained in some detail the possible confusion that may be engendered by the wording of such an instruction.

As we explained in *Allen*, "[o]ur concern in *Brown* was that the unadorned statutory instruction might in two interrelated ways lead the jury to misapprehend its discretion and responsibility. [¶] First, we pointed out that the jury might be confused about the nature of the weighing process. As we



observed, "[t]he word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider." [Citation.] [¶] Second, we were concerned in *Brown* that the unadorned instruction's phrase, 'the trier of fact . . . shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances' . . . could mislead the jury as to the ultimate question it was called on to answer in determining which sentence to impose. Although the quoted phrase could be understood to require a juror (i) to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal view as to the appropriate sentence, and then (ii) to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe death is the appropriate sentence under all the circumstances, we concluded in *Brown* that the statute was not intended to, and should not, be interpreted in that fashion. Instead we stated: 'By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.' [Citation.]" (42 Cal.3d at pp. 1276-1277, italics added in *Allen*.)

Because of the potential ambiguity inherent in a jury instruction which simply tracks the statutory language, *Brown* indicated that in cases tried after that decision, trial courts should give clarifying instructions, explaining to the jury the full scope of its discretion and responsibility under the 1978 law as interpreted in *Brown, supra*, 40 Cal.3d 512. With respect to cases, like the present matter, which were tried prior to *Brown*, we stated that we would examine each prior case "on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." (*Brown, supra*, 40 Cal.3d at p. 544, fn. 17.) Since *Brown*, we have undertaken such a review in numerous death penalty appeals. (See, e.g., *Allen, supra*, 42 Cal.3d 1222, at pp. 1276-1280; *People v. Myers* (1987) 43 Cal.3d 250, 273-276 [233 Cal.Rptr. 264, 729 P.2d 698]; *People v. Howard* (1988) 44 Cal.3d 375, 434-436 [243 Cal.Rptr. 842, 749 P.2d 279]; *People v. Hendricks* (1988) 44 Cal.3d 635, 650-651 [244 Cal.Rptr. 181, 749 P.2d 836]; *People v.*

Melton (1988) 44 Cal.3d 713, 761-762 [244 Cal.Rptr. 867, 750 P.2d 741];
Milner, *supra*, 45 Cal.3d 227, 253-258.)

The majority, of course, has undertaken such a review here, and has concluded that the jury was not misled in this case. (See, *ante*, pp. 252-253.) I agree with the majority that the first area of concern identified in *Brown* was not a problem in this case; in light of the entire record, particularly the closing arguments of both counsel, there is no reasonable likelihood that the jury thought that the "weighing" process was a "mechanical" procedure or did not realize that it could give different qualitative weight to each of the various aggravating and mitigating circumstances.

I cannot agree, however, with the majority's conclusion that the second concern of *Brown* was adequately satisfied. Indeed, when the entire record is considered, I think it is rather clear that the jury in this case was misled on this second, most fundamental point, i.e., on "the ultimate question [which] it was called on to answer in determining which sentence to impose." (*Allen, supra*, 42 Cal.3d 1222, 1277.)

As we have seen, in *Brown* and *Allen* we recognized that the crucial phrase in the 1978 law—"the trier of fact . . . shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances"—is, on its face, reasonably susceptible to varying interpretations, and "could be understood to require a juror (i) to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal view as to the appropriate sentence, and then (ii) to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe death is the appropriate sentence under all the circumstances . . ." (*Allen, supra*, 42 Cal.3d 1222, 1277.) As *Allen* emphasized, however, "we concluded in *Brown* that the statute was not intended to, and should not, be interpreted in that fashion." (*Ibid.*, italics added.) Instead, we held in *Brown* that the statute "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*Brown, supra*, 40 Cal.3d at p. 541.)

The record in this case reveals that from the very outset of the trial proceedings the jurors were repeatedly misinformed on this precise point. The source of the problem lay in the fact that both the prosecutor and the defense counsel misinterpreted the above-quoted phrase in the 1978 law in the very manner described in *Allen*, and proceeded on the assumption that, under the 1978 statute, each juror was not to make his or her own personal judgment of whether death was the appropriate punishment under all the



circumstances. Instead, both counsel believed that the law required the jurors simply to weigh the aggravating and mitigating factors without regard to their own assessment of the appropriate punishment and to impose the death penalty if aggravation outweighed mitigation.

The attorneys' confusion on this point is evident from several quotations from the jury voir dire which appear in the majority opinion's discussion of an entirely separate issue, the *Witherspoon* claim (*Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770]). As the majority opinion indicates, the district attorney told one prospective juror during voir dire "that the law requires a death verdict where aggravation outweighs mitigation, 'even if you personally don't think the crime is worth it . . .'" (*ante*, p. 247), and defense counsel conveyed the same misunderstanding to the same juror, informing her that if a juror weighed the evidence and determined that aggravation outweighed mitigation "the law mandates that you come in with a finding of death, no matter what your personal feelings may be." (*Ante*, p. 246)

As a review of the entire voir dire reveals, the passages quoted in the majority opinion are by no means isolated or atypical statements.¹ Throughout the lengthy voir dire process, counsel repeatedly informed potential jurors of this erroneous view of the jury's task at the penalty phase, and repeatedly sought assurance from potential jurors that they would adhere to this understanding of their role and would resolve the question of penalty solely on the basis of whether aggravation outweighed mitigation or mitigation outweighed aggravation,² without regard to the juror's own personal view of whether death or life without possibility of parole was the appropriate punishment under all the circumstances.³

¹At one point, the majority appears to imply that it may be improper to look to discussions between counsel and potential jurors during voir dire in determining whether or not the jurors properly understood the scope of their sentencing discretion under the 1978 law as interpreted in *Brown*. (*Ante*, pp. 254-255.) In *People v. Allen, supra*, 42 Cal.3d 1222, 1279-1280, however, this court—in evaluating a *Brown* claim similar to that at issue here—relied on a prosecutor's voir dire exchanges with potential jurors in finding that several comments made by the prosecutor during the penalty phase closing argument were not likely to have misled the jurors as to the scope of their sentencing discretion. If voir dire exchanges may be referred to in order to "cure" potential *Brown* error as they were in *Allen*, it is difficult to see a principled basis for refusing to consider such voir dire exchanges when they exacerbate, rather than alleviate, the potentially misleading impact of closing argument.

²Excerpts from the voir dire of several jurors who were chosen to sit on the jury illustrate the point.

"Q [District Attorney] . . . Now, the way the law is now, you are going to be given certain aggravating and mitigating factors. That's what they are called, aggravating and mitigating."

"A. Right."

"Q And it will be your job to evaluate the evidence presented not only at trial, but at the penalty portion, if we get there, and you will weigh the evidence and decide whether or not the aggravating circumstances outweigh the mitigating.

"A. Right.

"Q If the law directs you to a verdict of death, even though given your druthers and your idea of what the crime is worth, disagreeing with that, you are still obligated to follow the law even if the consequence is ultimately death.

"A. I understand that, also. I understand that the decision isn't based on where I think it is appropriate.

"Q. Right.

"A. No. I understand that.

"Q It is essentially going to be a legal decision based upon rules given to you.

"A. Right.

"Q Any problem with that format?

"A. I personally don't even know when it is appropriate and when the law says it is. I don't know that. So, those cases where I feel that it is appropriate, just my own personal—my own personal feelings. So that doesn't enter into it.

"Q I think I come from about the same place that you do, in that I would feel uncomfortable if I didn't have any guidelines.

"A. Un-huh.

"Q And I feel much better that I am told this is what is expected of me, and I think what you are telling me is you are willing to enter into that wholeheartedly, and you don't have any reservations—

"A. No, I don't.

"Q—about applying the law?

"A. About applying the law, no. I don't."

"Q [District Attorney] There will be a list of, I think, nine or ten factors that you will have to guide you as you approach the evidence and you will be told that if you find the factors in aggravation outweigh those in mitigation, that you shall return a verdict of death. Doesn't say you may, doesn't say it is one of your choices, it says you shall return a verdict of death. [?] Any problem with that?

"A. No.

"Q What if you are faced with a situation, though, where you personally, if you had to write on a blank slate, would not make this crime a death penalty crime, yet as you go through the factors it is clear to you that the law requires that verdict. [?] Can you put your own thoughts aside and follow the law?

"A. Yes, I could.

"Q Even on a question like this, which is possibly life or death?

"A. Yes, I could put it aside."

"Q [District Attorney] So, what they have done is created a lot of things to look at, about nine or ten factors. And essentially what you do is you take that evidence and plug it into the factors, and if you find that the ones that make the crime worse, those that aggravate it, outweigh the others you shall return a death penalty. If you find, on the other hand, that the factors in mitigation, make it less serious, outweigh it, you shall return a verdict of life without parole. [?] Essentially, you are making a legal decision, you are trying to apply the law of the State of California, trying to do essentially the will of the people in deciding what is the appropriate penalty, what they have said to be the appropriate penalty in this case. So, it is not so much you, personally, it is what you think the law requires.

"A. Uh-huh.

"Q I think it is a better way, I would be much more satisfied sitting as a juror in that situation, I trust you would, too. [?] But, what it may mean is it may mean that you personally if you had to do all over again, would not write the law that way. It might mean, 'Well, I don't think this crime deserves the death penalty,' yet as you look at what the factors are, you may be required to return a penalty of death. [?] Can you put aside what you personally feel and follow the law even in that situation?



Furthermore, the prosecutor repeatedly suggested to potential jurors that one of the virtues of such a sentencing procedure was that it relieved a juror of the responsibility of deciding "whether I personally think [the defendant] should die or not die" and contributed to the juror's "peace of mind" by enabling him to view his role as simply applying the law "as it has been passed." In light of the awesome nature of the responsibility of personally determining whether death is the appropriate punishment for another individual, it is not surprising that the jurors readily agreed that they would prefer not to have to make that kind of personal moral judgment. (Cf. *Caldwell v. Mississippi* (1985) 472 U.S. 320, 332-333 [86 L.Ed.2d 231, 241-242, 105 S.Ct. 2633].)

After inculcating the jurors during voir dire on this erroneous view of their sentencing role, the prosecutor reiterated this misunderstanding of the applicable principles in closing argument at the penalty phase.

At the beginning of his penalty phase argument, the prosecutor read the language of the pre-*Brown* instruction that the trial court subsequently gave the jury and explained to the jury: "... the test is whether aggravating outweighs mitigating or mitigating outweighs aggravating. There is no requirement that I have to prove the aggravating outweighs beyond a reasonable doubt, beyond clear and convincing evidence. The test is whether, when you weigh the two, do the aggravating factors outweigh the mitigating factors or vice versa. [?] If you find that the aggravating factors outweigh,

"A. I think I could."

"Q [District Attorney] ... The situation becomes most difficult, I think, when you are dealing about a question of life and death. The question as to whether or not the Defendant should get the death penalty or should not get the death penalty. Because the way the law is set up now, it is a very strict structure, there are a list of about nine or ten factors that you are to look at in deciding whether the death penalty should be imposed or whether life without possibility of parole should be imposed. [?] And, I believe it is quite possible that you, personally, if you were writing on a blank slate or writing the law yourself would, in a particular case, not think the death penalty was appropriate, but yet the law says it is.

"A. Un-huh.

"Q Will you be able to go along with the law?

"A. Yes.

"Q Okay, this is a rule of law, not of people; and, if you substitute your personal ideas for the law, you are frustrating the will of society which you are a member of.

"A. Right.

"Q Any problem with that idea?

"A. No.

"Q I think it also, I don't know, but if I was sitting on a jury such as this, for me to recognize that what I am essentially doing is apply the law as it has been passed and I am not personally deciding whether or not I like the Defendant, don't like the Defendant, whether I personally think he should die or not die, I find it far easier or I find it, at least for my peace of mind, a better way to do it, then in fact what I am doing is applying the law.

"A. Yes, that is the same thing I was thinking, just kind of remove yourself from—

"Q That's right ..."

and it can be a slight outweigh, it will be your obligation to return a verdict of death." (Italics added.)

Then, after discussing each of the individual factors at some length,⁴ the prosecutor returned to the question of what the law required of the jury. He stated: "We went through an extensive voir dire process in this case, and you were asked specifically, I think by myself, and I think I asked each and everyone of you, can you personally go along with this, personally commit yourself to the idea that even though you may have to make a difficult and emotionally touchy decision, can you do it, a personal commitment to what the law is going to require of you . . . [r] The important thing is this personal commitment that you have here to be willing to follow the law and to put aside what you would like to do for your own, you know, your own feeling of feeling good about it. [r] Well, I am asking you now to follow the law as it is given to you by the Court and apply it to the evidence as presented . . . [r] But, don't try to avoid the tough decision by sitting and trying to rationalize or trying to seek a way out of a tough decision, you are going to have to face it head-on, you are going to have to go through each and every one of those factors and decide it. Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty?" (Italics added.)

Although the majority opinion interprets the last quoted sentence as indicating that the prosecutor was telling the jurors to personally decide for themselves whether or not they felt that death was warranted (i.e., "appropriate"), when viewed in the context of the entire record I do not believe that that is how that sentence would have been understood by the jury. As we have seen, the prosecutor had carefully instructed the jurors during voir dire that it was "the law"—rather than the jury's personal judgment—which determines whether the death penalty is "warranted," and that the law mandates that death be imposed if aggravation outweighs mitigation. In this setting, I do not think that the emphasized sentence would have been viewed by the jury as contradicting all the prosecutor had previously ar-

⁴As the majority opinion acknowledges (*ante*, p. 255), in discussing the statutory factors the prosecutor erroneously told the jury that the absence of a mitigating factor constituted an aggravating factor. (See *People v. Davenport* (1985) 41 Cal.3d 247, 289-290 [221 Cal.Rptr. 794, 710 P.2d 861].) Thus, after completing his review of all of the factors up to factor (k), he told the jury: "it seems to me that before you even get to the last factor . . . you've got ten solid factors in aggravation, ten solid factors."

Although the impact of this type of so-called "*Davenport*" error (*supra*, 41 Cal.3d 247) may be reduced when it is clear that the jury realizes that its task is not simply to determine whether aggravation outweighs mitigation in an "objective" abstract sense but rather to determine whether, under all the circumstances, death or life without parole is the appropriate punishment, as discussed above there is very good reason in this case to fear that the jury did not properly understand this very point. Thus, in this case, the combination of the *Brown* and *Davenport* errors resulted in an increased prejudicial effect.

gued, but rather would have been understood simply as a reiteration of the prosecutor's theme.

Indeed, the prosecutor returned to that theme once again in his rebuttal closing argument. He stated: "The next thing is, you have to understand this is not a personal decision, it is not a situation where we toss the case to you and say, 'Hey, how do you feel today, do you want to impose the death penalty or not?' I don't know about you, but it is not something that I would like to do on a day-to-day basis, make that kind of decision. [r] What we said to you is here is the rule of law, here is the evidence, please apply the evidence to the rules of law and make a decision based upon what the law requires of you, same process that you went through in deciding guilt. [r] You are deciding the just punishment according to law. You're not deciding whether I like him, don't like him, whether it's my decision to impose the death penalty. [r] You have been given very clear guidelines, eleven of them, to direct your decision in this case. You have taken an oath that you would be willing to do that, and that's what you have to do." (Italics added.)

Then, at the end of his argument, the prosecutor advised the jury: "I would suggest, as you go through this evidence and you go through each factor, that you go through them one by one and decide whether that factor aggravates or that factor mitigates. [r] If you find at the very end that every factor that you've heard aggravates this crime, the penalty is, obviously, apparent, it is clearly the death penalty. But, let's say you find one factor mitigates and the other factors all aggravate. It is not a process of counting, it's not 10 to 1, it is a process of weighing. And, you should decide whether or not that one factor in mitigation outweighs all those factors in aggravation and then decide the case. [r] And the instruction is specific on this and I don't know if Defense Counsel is inviting you not to do this, that he is inviting you to make a decision independent of what the instruction is, but, this is what your obligation is, if you conclude the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death."

⁵At this point, the prosecutor was apparently referring to the brief comment in defense counsel's closing argument that is quoted by the majority: "Can (k) outweigh (a) through (j)? If you find that it does, it does, and that is your choice. That is what we are asking you to do." Although this remark may have suggested to the jury that it had the power to find that mitigation outweighed aggravation and thus to decline to impose the death penalty, defense counsel never argued that the statutory "aggravation outweighs mitigation" formulation was intended to require each juror to make his or her own normative judgment as to whether death was the appropriate punishment, and thus the quoted comment of defense counsel was vulnerable to the prosecutor's argument that counsel was inviting the jury to make a decision "independent of" the court's instruction. This is particularly so since, during voir dire, defense counsel never took issue with the prosecutor's repeated assertion that the law required the imposition of the death penalty if aggravation outweighed mitigation, without regard to the jurors' personal views as to appropriateness of the penalty under all the circumstances.

Viewing the record as a whole, I believe the jury in this case was clearly misled as to the scope of its discretion and the nature of its role in determining sentence. During voir dire, the potential jurors were repeatedly told that their task at the penalty phase was not to make a personal determination as to whether they thought death or life without parole was the appropriate punishment, but rather simply to determine whether the designated aggravating factors outweighed the mitigating factors. That misunderstanding of the jury's function was not corrected by the trial court's penalty phase instruction nor by closing argument of counsel.

Contrary to the majority's suggestion, my conclusion that the jury was misled in this case does not rest on any "assum[ption] that the jury must go through two separate assessments in arriving at a penalty determination." (Ante, p. 254.) If the jury properly understands that the weighing process is the means by which each juror determines whether he or she personally believes that death or that life imprisonment without possibility of parole is the appropriate punishment for the defendant in light of all the aggravating and mitigating factors, I have no doubt that jurors are quite capable of making an "appropriateness determination" in the course of the weighing process itself. But the jurors in this case were never instructed that the weighing process was a means for them to make such a personal appropriateness determination. Instead, they were affirmatively misinformed that it was *not* their responsibility to decide whether or not they personally believed that death was the appropriate punishment, and were told that, under the law, they were only to decide whether aggravation outweighed mitigation without regard to their personal view as to the appropriate penalty.

Although the majority purports to find support for its determination that the jury was not misled in the language of the 1986 revision of CALJIC No. 8.84.2 (see ante, p. 254)—an instruction that was not given to this jury—in fact that revised instruction contains a crucial passage which provides jurors with an entirely different message than the one which the prosecutor conveyed to the jurors in this case. The revised instruction specifically informs the jury that "[i]f you return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (Italics added.) As we have seen, the prosecutor in this case never suggested to the jurors that they had to determine whether the aggravating evidence in comparison with the mitigating evidence was "so substantial . . . that it warrants death instead of life without parole," but on the contrary argued that if the jurors found that the aggravating factors even slightly outweighed the mitigating factors the jurors were obligated to return a verdict of death and that it was not each juror's



responsibility to determine "whether it's my decision to impose the death penalty."⁶

Under these circumstances, I conclude that the penalty judgment should be reversed and the case remanded for a new penalty trial before a jury that is properly informed as to its responsibility and discretion in determining the appropriate penalty. (See *Milner*, supra, 45 Cal.3d 227, 256-268.)

Mosk, J., and Broussard, J., concurred.

⁶ Indeed, although the majority finds no *Brown* error in this case, the Attorney General has never argued that the jury was accurately informed of its proper penalty phase role under *Brown*, supra, 40 Cal.3d 512. In the only post-*Brown* brief filed by the Attorney General, the Attorney General simply argues that *Brown* was wrongly decided and should be overruled. We have, of course, recently reaffirmed the *Brown* decision. (See, e.g., *Milner*, supra, 45 Cal.3d 227, 253-258; see also *People v. Guzman* (1988) 45 Cal.3d 913, 958-959 [248 Cal.Rptr. 467, 785 P.2d 917].)

ORDER DUE
November 9, 1988

ORDER DENYING REHEARING

Crim. No. SGO4447
22584

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PEOPLE, Respondent
v.
RICHARD BOYDE, Appellant

SUPREME COURT
FILED
NOV 9 1988
Clerk
DEPUTY

APPENDIX B

Order of the Supreme Court of California
Denying Rehearing (Not Reported)

Appellant's petition
for rehearing DENIED.

Mosk, J., Broussard, J. and Arguelles, J., are of the opinion
the petition should be granted.


Chief Justice

88-66131

No. _____

Supreme Court, U.S.
FILED
FEB 2 1989
JOSEPH F. PATRICK, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RICHARD BOYDE, Petitioner

v.

THE STATE OF CALIFORNIA, Respondent

PETITION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Richard Boyde, asks leave to file the accompanying petition for writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Petitioner's affidavit in support of his motion is attached hereto.

DATED: FEB. 7, 1988

Respectfully submitted,

Dennis A. Fischer

DENNIS A. FISCHER
1448 Fifteenth Street
Suite 104
Santa Monica, CA 90404
Telephone (213) 451-4815

Counsel for Petitioner

APPENDIX C

Order of the Supreme Court of California
Staying Petitioner's Execution (Not Reported)

RECEIVED

FEB 16 1989

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD BOYDE, Petitioner

vs.

THE STATE OF CALIFORNIA, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Richard Boyde, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes _____ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

NONE

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

NONE

2. Have you received within the past twelve months any income from a

CERTIFICATE

I hereby certify that the petitioner Richard Boyde has the sum of \$ 500 on account to his credit at the California State Prison at San Quentin where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said institution.

Dated: 2/3/89, 1989

Arnold G. Smith
Authorized Officer of
California State Prison
at San Quentin
Correctional Counselor II

business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes ☐ No ☒

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

NONE — — —

3 Do you own any cash or checking or savings account (include any funds in prison accounts)? Yes No X

a. If the answer is yes, state the total value of the items owned.

Non E. - - -

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes No X

a. If the answer is yes, describe the property and state its approximate value.

NONE - - -

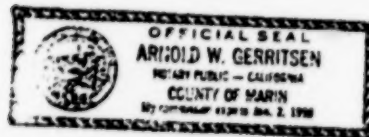
5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE - - - -

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Richard Bayle

SUBSCRIBED AND SWORN TO before me this 37th day of February, 1989.



Arnold W. Hunt
NOTARY PUBLIC

No. S004447

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE,

✓


RICHARD BOYDE

SUPREME COURT
FILED

JAN 4 - 1983

2/2/20 **Care**
DEPUTY

Application for stay of execution is granted and execution of the judgment of death entered against Richard Boyde by the Superior Court of Riverside County and affirmed by this court on August 11, 1988 (46 Cal.3d 212) is hereby stayed pending final determination of the petition for certiorari to be filed in the United States Supreme Court.


Chief Justice

Chief Justice

Mark
Associate Justice

Associate Justice

[Signature]
Associate Justice

Associate Justice

Kanell
Associate Justice

Associate Justice

Associate Justice

Associate Justice

Associate Justice

Associate Justice

Associate Justice

Associate Justice

UNITED STATES CONSTITUTION

Amendment 8

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

APPENDIX D

Constitutional Provisions and Statutes

United States Constitution
Amendment 8
Amendment 14

California Penal Code
section 190.2
section 190.3
section 1259

UNITED STATES CONSTITUTION

Amendment 14

"§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

CALIFORNIA PENAL CODE

§ 190.2. [Penalty upon finding special circumstance]

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

- (1) The murder was intentional and carried out for financial gain.
- (2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.
- (3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.
- (4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.
- (5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.
- (6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.
- (7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.
- (8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.
- (9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.
- (10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.
- (11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.
- (12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

DEATH PENALTY

§ 190.2

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Added by initiative measure § 6, approved November 7, 1978.

DEATH PENALTY

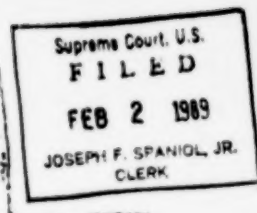
§ 190.3

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for a term of life without the possibility of parole.

Added by initiative measure § 8, approved November 7, 1978.



§ 190.3. [Determination as to penalty of death or life imprisonment]

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

- (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
- (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
- (c) The presence or absence of any prior felony conviction.
- (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.
- (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
- (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.
- (i) The age of the defendant at the time of the crime.

§ 1259. [Questions reviewable upon appeal by defendant; Necessity for exception or objection]

Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

Enacted 1872; Amended Stats 1909 ch 713 § 1 p 1086, Stats 1939 ch 1016 § 2 p 2801.

ORIGINAL

No. 88-6613

Supreme Court, U.S.
FILED
MAR 6 1989
JOSEPH F. SPANIOLO, JR.
CLERK

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RICHARD BOYDE,
Petitioner,
vs.
THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Do the Eighth and Fourteenth Amendments preclude a trial court from instructing a penalty phase jury in a capital case that, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death," and does such an instruction require reversal of the resulting death sentence where the prosecutor urged the jury to apply the law and to weigh and balance the circumstances in aggravation against those in mitigation in determining the appropriate penalty?

2. Does a California sentencing proceeding violate Lockett v. Ohio (1978) 438 U.S. 586, and is the jury prevented from considering aspects of the defendant's character or record, where the jury is instructed to consider a list of possible aggravating and mitigating factors, as well as "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," and all the defense evidence before the jury at the penalty phase related to the defendant's background and character and defense counsel argued at length for giving great weight to such evidence?

PARTIES

Petitioner, Richard Boyde, is a prisoner incarcerated under judgment of death at the California State Prison at San Quentin, California. Respondent is the State of California.

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OPINION BELOW

Petitioner seeks review of an opinion of the California Supreme Court affirming his judgment of death. (People v. Boyde (1988) 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25.) The opinion of the California Supreme Court is attached as Appendix A to the petition.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. section 1257(3).

CONSTITUTION, STATUTES AND PROVISIONS INVOLVED

United States Constitution, Eighth and Fourteenth Amendments, and California Penal Code sections 190.2 and 190.3. These provisions appear in Appendix D to the petition.

STATEMENT OF THE CASE

Following a jury trial, petitioner Boyde was convicted of robbery (Cal. Pen. Code, § 211) and kidnapping for robbery (Cal. Pen. Code, § 209), and was found to have personally used a knife in perpetrating those offenses (Cal. Pen. Code, § 12022, subd. (b)) on a gas station attendant in Riverside on January 5, 1981. In addition, petitioner was convicted of robbery (Cal. Pen. Code, § 211), kidnapping for robbery (Cal. Pen. Code, § 209) and first degree murder (Cal. Pen. Code, §§ 187, 189) of the clerk in a 7-Eleven store in Riverside on January 15, 1981. The jury found two special circumstances true, i.e. murder during the commission of robbery (Cal. Pen. Code, § 190.2, subd. (a)(17)(i)), and murder during the commission of kidnapping for robbery (Cal. Pen. Code, § 190.2, subd. (a)(17)(ii)). The jury also found that petitioner personally used a firearm in perpetrating all three offenses (Cal. Pen. Code, § 12022.5), and specially found that petitioner "personally killed [the victim] with express malice aforethought and premeditation and deliberation." (CT 367-379.)¹ The jury fixed the penalty as death. (CT 549.)

1. "CT" refers to the Clerk's Transcript, while "RT" refers to the Reporter's Transcript.

On automatic appeal, the California Supreme Court affirmed the judgment, including the death penalty, in its entirety. The abstract of judgment was ordered corrected in a minor respect not pertinent to this petition. (People v. Boyde (1988) 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25.) Petitioner's petition for rehearing was denied on November 9, 1988, in an unpublished order. (Attached as Appendix B to the petition).

STATEMENT OF FACTS

A. The Robbery and Kidnapping of Lon Creech

In the early morning hours of July 13, 1976, Lon Creech was the nightclerk at a 7-Eleven market located at 8703 Indiana Street in the city of Riverside. Mr. Creech had locked the door, in order to do some restocking. At approximately 3:30, a Black man knocked at the door, and Mr. Creech admitted him. A second man entered the store, pulled a gun, and stated, "This is a robbery." Mr. Creech subsequently identified the second man as petitioner Richard Boyde. Petitioner demanded money from the cash register, as well as Mr. Creech's watch, wallet, and keys. Mr. Creech gave each item to petitioner. Petitioner also wanted money from the store safe, but Mr. Creech did not have access to it. (RT 2315-2319.)

Mr. Creech was ordered outside, and was placed in the trunk of his car. Mr. Creech's car left the area of the store and was driven for between thirty to forty-five minutes. The car stopped, and petitioner and his companion were met by a second group of individuals. Petitioner Boyde stated they had just robbed a store, had the clerk in the trunk, and were deciding what to do with him. Petitioner mentioned the possibility of putting a .22 caliber bullet in Mr. Creech's head, or driving the car over a cliff with Mr. Creech in the trunk. The car was then driven about again for approximately one-half hour. Eventually the car stopped on a dirt road in an orange grove. Mr. Creech was taken from the trunk by petitioner and told to walk down the dirt road. Petitioner, gun

in hand, told Mr. Creech to kneel down. Petitioner was calm. Petitioner then asked Mr. Creech if he wanted a cigarette. Mr. Creech took one. Petitioner told Mr. Creech not to turn around. Petitioner then departed in Mr. Creech's car. (RT 2315-2325.)

On July 19, 1976, Officer William Edwards observed Mr. Creech's car and attempted to stop it. A high-speed chase ensued. Petitioner Boyde, the driver of the car, eventually abandoned the vehicle, but was subsequently captured and placed under arrest. (RT 2357-2364.)

Detective Jerry Knofflock of the Riverside Police Department interviewed petitioner after his arrest. Petitioner claimed he had borrowed Mr. Creech's car from a friend. In addition, Mr. Creech's watch was found on petitioner. Petitioner claimed he had purchased the watch from a friend for ten dollars. (RT 2371-2376.)

The parties stipulated that petitioner had pled guilty to the kidnapping of Lon Creech, and had been sentenced to state prison. (RT 2379-2380.)

B. The Robbery and Kidnapping of David Baker

On January 5, 1981, at approximately 2:00 a.m., David Baker was working at a "76" gasoline station at 136S Blaine in the city of Riverside. At approximately that hour, petitioner entered the station, displayed two knives, and demanded money and Mr. Baker's watch. Mr. Baker turned over his money and watch. Petitioner then demanded that Mr. Baker open the station safe. Mr. Baker stated he could not. Petitioner and Mr. Baker went to Mr. Baker's car. Petitioner ordered Mr. Baker into the trunk. However, the trunk was too small and Mr. Baker was ordered instead to get in the driver's seat. Petitioner got into the passenger seat. (RT 2392-2403.)

The pair, at petitioner's direction, drove to a park. Petitioner ordered Mr. Baker out of the vehicle, and told him not to run because petitioner was very fast. The pair talked for a period of time, petitioner stating he did not know what to do with Mr. Baker. (RT 2403-2405.)

The men returned to the car and drove to a nearby doughnut shop. Petitioner purchased Mr. Baker a doughnut. The pair left the shop and got into Mr. Baker's car. When the car would not start, the men began walking. Eventually petitioner departed. (RT 2405-2409.)

C. The Robbery, Kidnapping, and Murder of Dick Gibson

On January 14, 1981, at approximately 11:15 p.m., Carolyn Baugh ended her shift, turned over the 7-Eleven store 8703 India Street to Dick Gibson, and departed. The store was in a normal condition. (RT 2382-2383.)

At approximately 1:00 a.m., Dennis Gibson visited his brother, Dick, at the 7-Eleven store. Dennis stayed until 1:40 a.m., then departed. (RT 2432-2436.)

John Cummings, owner of the 7-Eleven store at 8703 India Street, arrived at his store at 5:00 a.m. on January 15, 1981. Mr. Cummings found thirty-three dollars and Dick Gibson missing from the store. Mr. Cummings also noted a small hole in the store window which he had not noticed before. Ms. Baugh returned to the store in the morning, noticed the small hole, and stated it had not been there when she had left the store the night before. (RT 2383-2384, 2437-2440.) Mr. Cummings noted that it was store procedure to lock the door at 2:00 a.m., and to admit customers only at the clerk's discretion. (RT 2440-2441.)

On January 15, 1981, at approximately 7:30 a.m., George Snider was driving in the area of Cleveland and Monroe Streets in the city of Riverside, when he noticed what he believed was a body in the area of an orange grove some distance off the street. Mr. Snider got out of his vehicle and walked to within three to five feet of the body of Dick Gibson. Mr. Snider did not get near the head of the body. Mr. Snider was wearing size ten cowboy boots with a small heel and pointed toe. Mr. Snider drove to the 7-Eleven market at 8703 India Street to call the police, but found them already at the store. (RT 2843-2484.)

At approximately 7:30 a.m., Detective George Callow proceeded to the area where Dick Gibson's body had been found. The officer began to investigate the crime by examining the physical evidence at the scene. Near Mr. Gibson's head, the officer discovered a flat-soled left-shoe print. This shoe print was the one nearest Mr. Gibson's head. Mr. Gibson was wearing tennis shoes with a herringbone sole pattern. The officer also discovered prints left by Mr. Snider's cowboy boots, and several diamond-soled prints, all of which were below the waist level of Mr. Gibson's body and at least four-and-a-half feet away. The officer also found additional flat-soled prints that could not be accounted for by any shoe known to have been at the scene. (RT 2489-2508.)

An autopsy was performed on the body of Dick Gibson on January 16, 1981. The pathologist found a bullet wound above the right ear and a bullet wound in the forehead, surrounded by a fine peppering of dark spots. This powder residue indicated a gun shot fired closer than sixteen inches from the head, while the absence of such residue around the second wound indicated a shot from more than sixteen inches. The shot above the right ear entered the skull and fragmented. The bullet did not exit. The shot to the forehead did not penetrate the skull. Death resulted from the penetration wound to the right side of Mr. Gibson's head. Mr. Gibson could have lived several moments after the penetration wound and could have made gurgling or groaning sounds. (RT 2523-2542.)

The doctor also found fresh scrape-like wounds at the base of Mr. Gibson's left palm. (RT 2286.) The doctor found four or five abrasions in the skin of the victim's left palm, abrasions of the front part of the neck, and abrasions of the right and left knee. These knee abrasions were caked with dirt. The doctor also found a one-half inch long laceration on the left side of the back. (RT 2529-2530.) These wounds were consistent with someone falling while running and then kneeling at another location. (RT 2543-2524.) In addition, the doctor found a

gunshot wound to the small finger of the victim's left hand. The bullet had first grazed the fourth finger, before striking the fifth. (RT 2523-2527, 2535-2536, 2543-2545.)

On January 20, 1981, Detective Callow received a photograph of petitioner from a Deputy Knofflock. Callow, noting a resemblance between petitioner's photograph and a composite drawing prepared from the description of the robber of David Baker, prepared a photo line-up containing that photograph. The line-up was shown to David Baker, who picked out petitioner as the man who had robbed him. (RT 2570-2573.) A search warrant was obtained for petitioner's residence. At the residence, the officers placed petitioner under arrest and discovered Mr. Baker's watch, taken in the robbery, and clothing consistent with that described by Baker as being worn by the robber. (RT 2573-2575.)

Petitioner was taken to police headquarters. Petitioner was admonished; he waived his rights and agreed to speak to the officers. An interview was commenced with regard to the robbery of David Baker. Petitioner denied involvement, stating he purchased the watch for ten dollars from a "Moe," who looked like petitioner and to whom petitioner had loaned clothing that fit the description given by Baker. Detective Callow, understandably incredulous, told petitioner he had him. Petitioner agreed. (RT 2575-2580, 2582-2584.)

Petitioner stated to Detective Callow, "I can't go back to jail." Petitioner asked if there was anything he could do to keep from returning to prison. Detective Callow stated he could make no commitments. Petitioner asked what effect on his sentence would result from petitioner turning over information concerning a robbery. The officer stated petitioner had been arrested for kidnapping and robbery, and would have to have information concerning something far more serious before any consideration could be given to dealing with him. Petitioner then asked, "What if I have information about a murder?" (RT 2585-2587.)

Petitioner stated he had information concerning the murder of the football coach at the 7-11 market. Petitioner stated he had been at the residence of his nephew, Carl Franklin, at 2:30 or 3:00 in the morning, when Carl and a "Big Mike" arrived. "Big Mike" withdrew a .22 caliber gun from a paper bag, which also contained money. Petitioner noticed blood on "Big Mike's" hand. Petitioner asked his nephew where the money had come from, and "Big Mike" interrupted to state he was not sure they should say. Petitioner's nephew then replied they had robbed a 7-11 store on India Street, taken the clerk to an orange grove, and shot him. In response to these statements, attempts were made to discover more about the identity of "Big Mike" and Carl Franklin, but these attempts failed. (RT 2587-2593.)

Unable to locate either "Big Mike" or Carl Franklin, the officers again questioned petitioner. The officers told petitioner they did not believe he had been truthful. (RT 2627-2633.) Petitioner stated he had gone to the 7-11 market with "Big Mike" and Carl Franklin. Petitioner explained the three men had driven about, and Carl had eventually produced a .22 caliber revolver. The trio eventually drove to the 7-11 store on Indiana Street. Petitioner wanted to get a pack of cigarettes and something to drink. "Big Mike" told petitioner he would go in and pick up the merchandise. As Carl and petitioner sat in the car, petitioner saw the store clerk unlock the door and allow "Big Mike" to enter. Petitioner looked through the store window and saw "Big Mike" point the .22 caliber revolver at the clerk. After taking money from the cash register, "Big Mike" and the clerk exited the store and walked to the car. (RT 2627-2654.)

"Big Mike" opened the rear door of the car and ordered the clerk to get in the opposite rear door. The clerk started to enter the vehicle, then turned and ran. "Big Mike" fired a shot at the clerk, but missed. As "Big Mike" pursued him, the clerk fell to the ground. "Big Mike" and the clerk then returned to

the car. Petitioner asked "Big Mike" to let the clerk go. "Big Mike" said no and told Carl to drive to an orange grove near the store. The car stopped, and "Big Mike" ordered the clerk to get out of the car and get on his knees. Carl and petitioner stayed in the car, and saw "Big Mike" shoot the clerk. At the time he was shot, the clerk was on his knees, with his hands on top of his head. After the first shot, the clerk dropped his hands and turned partially around. "Big Mike" then fired a second shot and the clerk dropped straight forward to the ground. "Big Mike" rolled the clerk over and again, from point-blank range, shot the clerk in the head. (RT 2633-2654.)

"Big Mike" returned to the car. Petitioner asked to be taken home. Petitioner stated "Big Mike" was wearing tennis shoes. Petitioner stated he had on tennis shoes also, and Carl had on shoes called "croaker sacks." (RT 2657-2660.)

After additional questioning in which the officers indicated petitioner had revealed too much about the robbery not to have been at the store, petitioner admitted there was no such person as "Big Mike," and that he and Carl had committed the robbery. Petitioner stated the idea to commit the robbery was Carl's, and it was Carl who had got the gun. (RT 2731-2732.)

Petitioner stated that when he and Carl arrived at the 7-11, they were admitted by the clerk. Petitioner walked out the door after buying a package of cigarettes. Petitioner was aware Carl was going to rob the clerk. Petitioner looked back and saw Carl pull the gun, then heard him tell the clerk that he was being robbed. Carl ordered the clerk to place the money from the cash register in a paper bag. The man complied. Carl then ordered the clerk out of the store. Petitioner stated he did not know the clerk was going to be taken from the establishment. Petitioner got in the driver's seat of the car. The clerk got in the back seat, and Carl in the front passenger seat. The clerk jumped out of the car and ran. Carl fired a shot, but missed the man. As Carl pursued him, the clerk fell to the ground at least once and perhaps twice, allowing Carl to catch up to him. Carl

and the clerk returned to the car, and both got in the back seat. (RT 2657-2725.)

Petitioner drove to the area of an orange grove, where Carl told him to stop. Carl ordered the clerk from the car. Carl ordered the clerk to get on his knees and to put his hands over his head. Petitioner asked Carl what he was going to do, and Carl stated he did not know. Petitioner began to walk around and make sure no one else was in the area. Carl then fired a shot. The clerk took his hands from his head, and looked at his hand. Carl then fired a second shot into the back of the clerk's head. The clerk fell forward. Carl stated that he was not sure the man was dead and that he believed he should shoot the man again. Carl rolled the man over, stood over him, and fired a shot into the man's head. (RT 2725-2726.)

Petitioner stated the tennis shoes seized at petitioner's residence were not the ones he was wearing at the scene. The shoes he wore that night might be at Carl's house. (RT 2727.) Petitioner stated Carl had on a type of shoes called "croaker sacks." (RT 2728-2729.)

On January 23, 1981, a search warrant was served on the residence of Carl Franklin Ellison. In the house, the officers found a loaded .22 caliber revolver and two pair of tennis shoes. (Peo. Exhs. 21-1, 21-2.) (RT 2744-2753.)

Criminalist Linda Harstrom, in January, 1981, received from the pathologist bullet fragments taken from the forehead of Dick Gibson. Ms. Harstrom examined these fragments and determined they were consistent with copper-washed .22 caliber long rifle bullets. The doctor also gave Ms. Harstrom metal fragments associated with the wound to the rear of Mr. Gibson's head. These fragments were also consistent with a copper-washed .22 caliber bullet. (RT 2761-2764.)

On January 30, 1981, Ms. Harstrom examined the Buick Electra automobile owned by Carl Ellison's mother. Specifically, Ms. Harstrom compared the tire treads of that vehicle to the tire tracks left at the scene of Mr. Gibson's murder. The right rear

tire of that vehicle was consistent in all respects with the tread pattern impressions found at the scene. The right rear tire of Mr. Ellison's vehicle was an off-brand, whose manufacture could not be determined. (RT 2766-2771, 2825-2826.)

Ms. Harstrom also compared the tread pattern on the tennis shoes seized at the Ellison residence to the tennis-shoe tread pattern found at the scene. Ms. Harstrom was able to determine that one pair could not have made the impressions found, but that the other shoe was consistent with, and had no dissimilarities to, the tennis-shoe pattern found near Mr. Gibson's body. (RT 2771-2778.)

Ms. Harstrom measured the flat-soled shoe print found near Mr. Gibson's head, and estimated it was made by a shoe ranging in size from 7 to 9. The print could not have been made by a size 13 shoe. The tennis shoe taken from Mr. Ellison's residence was consistent with the tennis-shoe print found at the scene, and was a size 13. (RT 2780-2785.) Both petitioner's and Ellison's feet were measured. Ellison's foot size was 13, while petitioner's was 9 1/2. (RT 2890-2891.)

Otharaean Owens, the mother of Carl Ellison and half-sister of petitioner, stated Ellison lived with her. Ms. Owens stated that, on January 15, 1981, Ellison was eighteen years old, and petitioner was twenty-four. Ms. Owens stated the .22 caliber revolver seized at her residence belonged to her. (RT 2823-2856.) Mrs. Owens saw petitioner while he was in jail and asked him why he had done this to her son. Petitioner told her Ellison was not involved. (RT 2832-2833.)

Codefendant Ellison testified at trial that it was petitioner and not Ellison who conceived the idea for the 7-Eleven robbery, and who shot the victim. (RT 2962-2992.) Ellison testified that he had lied in his earlier statements to the police, wherein Ellison had accepted responsibility for shooting the victim. In his later statement to the police, Ellison stated that petitioner had shot the victim. Ellison stated that he had lied earlier because he loved his uncle, did

not want him to go back to prison and wished to protect him. (RT 2996-2999, 3249-3272.)

SUMMARY OF RESPONDENT'S ARGUMENT

Instructing the jury it "shall" impose the death penalty if aggravating circumstances outweighed mitigating circumstances and "shall" impose life without possibility of parole if mitigating circumstances outweighed aggravating circumstances, did not create a mandatory death penalty, nor did it prevent the jury from making an individualized determination of penalty in petitioner's case. Such an instruction does not violate the federal Constitution, because the jury under California law has broad discretion to determine what factors it finds to be in aggravation and mitigation, and broad discretion to then weigh and balance those factors in determining the appropriate penalty in the exercise of its broad discretion. Rather than providing for some type of mandatory death penalty, or preventing individualized determination of penalty, the instructions provide the jury with guided discretion, consistent with past decisions of this Court.

Moreover, the California Supreme Court correctly concluded that petitioner's jury properly understood its obligation in this case.

The instructions given provided the jury with guided discretion in determining the appropriate penalty, and did not prevent the jury from considering any mitigating evidence in the case.

Moreover, the California Supreme Court correctly concluded that since all the defense evidence at the penalty phase in this case related to petitioner's background and character, and defense counsel argued at length for giving great weight to such evidence, while the prosecutor argued only the weight to be given the evidence and did not assert its irrelevancy, the jury could not have been misled by the "factor (k)" catchall instruction into thinking background and character evidence was irrelevant to its determination of penalty.

ARGUMENT

I

THE "SHALL" PORTION OF CALJIC INSTRUCTION 8.84.2 DID NOT CREATE A MANDATORY DEATH PENALTY, NOR DID IT PREVENT THE JURY FROM MAKING AN INDIVIDUALIZED DETERMINATION OF PENALTY, BECAUSE THE JURY HAD BROAD DISCRETION TO DETERMINE THE FACTORS IN AGGRAVATION AND MITIGATION AND THEN TO WEIGH AND BALANCE THOSE FACTORS IN DETERMINING THE APPROPRIATE PENALTY IN THE EXERCISE OF ITS DISCRETION

Petitioner objects to the language in CALJIC No. 8.84.2 stating that the jury "shall" impose the death penalty if it finds the aggravating factors outweigh the mitigating factors.

First, we observe that the entire instruction challenged by petitioner was as follows:

"It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

"After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

"If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole." (CT 538; RT 4836.)

The jury was then given an extensive list of possible aggravating and mitigating circumstances, the last of which told the jury it could consider "any other" circumstance in mitigation, whether or not it constituted a legal excuse for the crime. (CT 541-542; RT 4831-4833.)

The fact that the jury was instructed it "shall" return a verdict of death if, after weighing the circumstances in aggravation and mitigation it concluded the circumstances in aggravation outweighed those in mitigation, did not make the penalty verdict a "mandatory" penalty under this Court's decisions.

This Court has recognized that states are entitled to considerable discretion in determining how to structure a capital sentencing scheme. The only federal limitations are those required by the United States Constitution. (Cabana v. Mississippi (1986) 474 U.S. 376, 386. There are "two central principles of our Eighth Amendment jurisprudence." (California v. Brown (1987) 479 U.S. 538, 544 (O'Connor, J., conc.)) The first requires limiting and guiding the discretion to impose the death penalty so as to minimize the risk of wholly arbitrary and capricious action. (Gregg v. Georgia (1976) 428 U.S. 153, 189.) The second is that the sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense. (California v. Brown, supra, 479 U.S. at p. 544 (O'Connor, J., concurring).)

Jury instructions are examined from the perspective of how a "reasonable jury" would understand and apply them. (Mills v. Maryland (1988) 486 U.S. ___, 100 L.Ed.2d 384.

The whole point of this Court's decisions in Gregg, Proffitt, and Jurek (Gregg v. Georgia, supra, 428 U.S. 153; Proffitt v. Florida (1976) 428 U.S. 242; Jurek v. Texas (1976) 428 U.S. 262), is that the decision to impose death must be guided in a specific way and cannot be arbitrary and capricious. (See, Barclay v. Florida (1983) 463 U.S. 939.) However, petitioner's suggestion that the jury be allowed free reign to decide what penalty is appropriate after it finds the aggravating circumstances outweigh the mitigating circumstances would result in arbitrary and capricious decision making. This is improper.

Consequently, it is constitutionally permissible to give the jury consideration of a broad scope of evidence, give it various categories of aggravating and mitigating circumstances, give the jury broad discretion to determine what constitutes circumstances in aggravation and mitigation in a given case, as well as broad discretion in deciding for itself how to weigh and balance the factors in aggravation against those in mitigation, and then advise it that if it finds the aggravating circumstances outweigh the mitigating circumstances it shall impose the death penalty.

This Court has held a death penalty based on affirmative answers to specific questions (deliberate acts and future dangerousness) by the jury does not violate the Eighth Amendment, because it does not prevent the jury from considering any relevant mitigating evidence in the case in view of an instruction that the jury arrive at its verdict based on all the evidence. (*Franklin v. Lynaugh* (1988) 487 U.S. ___, [101 L.Ed.2d 155, 159-160; see also *Jurek v. Texas*, *supra*, 428 U.S. 262.]) California's procedure provides the jury with much broader discretion than the Texas procedure which has been upheld by this Court, since in California the jury has discretion to decide what the circumstances in aggravation and mitigation are and has broad discretion to balance those factors in arriving at an individualized determination of penalty in a given case. Moreover, pursuant to California Penal Code section 190.3, petitioner's jury was expressly invited to consider other extenuating circumstances than are expressly provided for under Texas law.

Contrary to petitioner's contention, the instruction told the jury to weigh, not simply to mechanically add, circumstances in aggravation against those in mitigation, and to impose death "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances" (CT 538, RT 4836; emphasis added.) The instruction does not permit a simple mechanical adding and comparison of factors in aggravation

and mitigation. Instead, it requires the jury to engage in a weighing process, which necessarily involves a qualitative determination of the relative weights the jurors choose, in the exercise of their discretion, to assign to various factors shown by the evidence in the case.

As the California Supreme Court reiterated in this case:

"In *People v. Brown*, *supra*, 40 Cal.3d at pages 538-545, we concluded that the directive of section 190.3 that the trier of fact 'shall impose a sentence of death' if it 'concluded that the aggravating circumstances outweigh the mitigating circumstances' did not impermissibly restrict the jury's sentencing discretion. We rejected the defendant's proffered mechanistic construction of the words 'outweigh' and 'shall' in favor of one which directed the jury to weigh the various factors and determine under the relevant evidence which penalty is appropriate in a particular case." (*People v. Boyde* (1988) 46 Cal.3d at p. 252.)

Under the challenged instruction it is the jury which decides where the balance lies. There is nothing "mandatory" either about the process or about the result reached in any given case. Nothing in this, or any of the other instructions, suggested or required that the jury come to a particular conclusion on the appropriate penalty. Nothing in this instruction prevented the jury from determining that any given circumstance or circumstances in mitigation outweighed, in the exercise of the jury's discretion, any or all of whatever factors the jury determined, in the exercise of its discretion, were in aggravation.

The jury was told it was to "consider, take into account and be guided by" the applicable factors of aggravating and mitigating circumstances upon which it had been instructed.

The jury was left free to judge the quality of each factor and to assign it whatever weight it felt appropriate.

As the California Supreme Court stated in this case:

"In the present case, both the prosecutor and defense counsel repeatedly told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. They also made it clear that the jury was free to assign whatever weight it wanted to any particular factor." (People v. Boyde supra, 46 Cal.3d at p. 253.)

Petitioner's federal constitutional claim is without merit.

Petitioner attempts to confuse the federal constitutional issue by reliance on the "concerns" identified by the California Supreme Court in People v. Brown (1985) 40 Cal.3d 512. The California Supreme Court acknowledged in Brown that the phrase "shall impose a sentence of death" might "leave room for some confusion as to the jury's role," but has rejected the claim that the 1978 statute unconstitutionally authorized a mandatory death penalty. (Ibid.; reversed on other grounds in California v. Brown, supra, 479 U.S. 538.)

The California Supreme Court has further held that a death judgment is invalid under the Eighth Amendment if imposed by a sentencer that believed it lacked ultimate moral responsibility to determine what penalty is appropriate under all the circumstances of the case. (People v. Melton (1988) 44 Cal.3d 713, 761, 244 Cal.Rptr. 867, 750 P.2d 741.) At the same time, jurors are not to receive such unbridled discretion that arbitrary decisions are likely. (Furman v. Georgia (1972) 408 U.S. 238.)

As the California Supreme Court clearly explained in this case:

"Our concerns in Brown were essentially two: The first was that the jury might be confused about the

nature of the weighing process, that it is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process. Our second concern was that use of the word 'shall' might mislead the jury as to the substance of the ultimate determination it was called upon to make. In Brown, we concluded that the statutory language 'should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. Thus, the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.' (40 Cal.3d at p. 541.)

"In the present case, both the prosecutor and defense counsel repeatedly told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. They also made it clear that the jury was free to assign whatever weight it wanted to any particular factor." Although the prosecutor argued that the jury was obliged (i.e., it 'shall') to return a death verdict if it found that the aggravating factors outweighed the mitigating even slightly, he also told the jury that its ultimate determination was: 'Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty.' In his final summation, the prosecutor stated, 'and the point now becomes, and the only question is, should it [the death penalty] be or should it not be imposed.' Defense counsel also made it clear the ultimate penalty was the jury's choice: 'Can (k) outweigh (a) through (j)? If you find that it

does, it does, and that is your choice. That is what we are asking you to do.'

"In our view, the Brown concerns were satisfied here. The jury was clearly informed that the word 'weigh' did not connote mere counting, but rather involves a qualitative judgment. The jury was also adequately informed as to its discretion in determining whether death was the appropriate penalty. Obviously, when jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they necessarily understand they have discretion to determine the appropriate penalty. The task of assigning weights is not an arid exercise performed in a vacuum; it is the very means by which the jury arrives at its qualitative and normative decision as to the appropriate penalty. We recognized this in Brown, where we explained: 'Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor 'k' as we have interpreted it. [Fn.] By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines, under the relevant evidence which penalty is appropriate in the particular case.' (40 Cal.3d at p. 541, italics added.)" (People v. Boyde, *supra*, 46 Cal.3d at pp. 253-254.)

It is manifest from what the California Supreme Court has said that under California law the jury makes an individualized determination of penalty, and did so in this case.

Petitioner objects to use of the word "shall" in CALJIC No. 8.84.2, claiming that word somehow creates a duty to return a verdict of death. However, "shall" is also used in the portion of the instruction dealing with life confinement. (CT 538; RT 4836.) The instruction is equally balanced in that it likewise tells the jury it "shall" determine the penalty to be life imprisonment without parole if it concludes the circumstances in mitigation outweigh those in aggravation. Use of "shall" equally to describe both options could not possibly be misconstrued by a reasonable juror to mean one option should be chosen over the other. Moreover, use of "shall" merely mirrors the language of Penal Code section 190.3, which states the trier of fact shall take into account various relevant factors. Petitioner's contention such language may create a situation where the jury is obligated to impose the death penalty when it finds the aggravating circumstances outweigh the mitigating circumstances, even though it does not believe the aggravation is sufficient to justify death, makes no sense. Initially, it would be factually impossible for a jury to conclude the aggravating circumstances outweighed the mitigating circumstances and yet subjectively feel the death penalty was not warranted. Under CALJIC No. 8.84.1(k) the jury could consider any fact it wished to mitigate the crime and not impose the judgment of death. Given this fact, it is absurd to suggest that in spite of subsection (k), the jury would find the aggravating circumstances outweighed the mitigating circumstances and then still decide the death penalty was inappropriate.

Moreover, any modification to the instruction here would probably violate the federal constitution.

"'. . . [D]iscretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Gregg v. Georgia, 428 U.S. 153, 189 (1976). . . ." (Zant v. Stephens (1983) 462 U.S. 862, 874.)

The language in CALJIC No. 8.84.2,

" . . . was directly taken from the 1978 death penalty law and accurately describes the jury's function under that law: to weigh the applicable aggravating and mitigating factors and, on that basis, and that basis alone, to determine whether death is an appropriate remedy." (People v. Hendricks (1988) 44 Cal.3d 635, 654, 244 Cal.Rptr. 181, 749 P.2d 836; emphasis in original.)

Where the record demonstrates that the jury fully understood that it could assign whatever weight it thought appropriate to the factors in aggravation and mitigation and that it should base its penalty determination on all of the evidence in the case, use of the word "shall" in the instructions and argument does not compel a finding that the jury was misled "from an otherwise assumed proper understanding of its duty to determine appropriateness of death through the weighing process." (People v. Hendricks, supra, 44 Cal.3d at p. 655.)

Thus, petitioner's contention in this regard is meritless not only as a matter of federal constitutional law, but also based upon the California Supreme Court's construction of California law. (See, People v. Harris (1981) 28 Cal.3d 935, 963-964, 171 Cal.Rptr. 679, 623 P.2d 240.)

This Court recently denied certiorari on this same issue in Hamilton v. California, No. 88-5746, cert. denied Jan. 23, 1989 ___U.S.___, as petitioner backhandedly concedes. In an attempt to avoid the impact of the denial of certiorari on this identical issue in Hamilton v. California, supra, petitioner argues that his case offers a particularly "compelling context" for resolution of the issue.

It is noteworthy, however, that petitioner does not argue that the issue is in fact any different from that on which this Court very recently denied certiorari in Hamilton.

As for the alleged "compelling context" of the present case, petitioner argues that in Hamilton the jury was further instructed that it must be convinced "beyond a reasonable doubt"

that the aggravating factors prevailed in order to impose the death penalty. But this is not a constitutional requirement. Indeed, petitioner does not so much as argue that a "beyond a reasonable doubt" instruction is constitutionally required. The fact that it was given in Hamilton does not, therefore, change the nature of the constitutional issue presented by the petition in this case.

Lacking any other support for his argument, petitioner attempts to rely on statements of the prosecutor to show that the jury was unduly limited in its consideration of penalty.

First, he refers to two statements of the prosecutor in argument to the jury. In the first, the prosecutor quite properly noted that there was no requirement that the jury find "beyond a reasonable doubt" that the circumstances in aggravation outweighed those in mitigation. (Petn. at p. 11, citing RT 4767.) Significantly, the prosecutor affirmed to the jury what is constitutionally required, i.e. that, "It is merely a question of weighing." (RT 4767; emphasis added.) There was nothing improper in the prosecutor's statement.

In the next statement referred to by the prosecutor, petitioner argues that the following statement of the prosecutor suggested "an unduly narrow focus on the jury's part" when it came to the "weighing" process.

"If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." (Petn. at p. 11, citing RT 4767; emphasis added by petitioner.)

This statement provides no basis for overturning the sentence in this case. The statement in fact reaffirms that it is "you," i.e. the jury (not the prosecutor or the court or the Legislature or anyone else) which had the "obligation" to find and weigh the factors in aggravation and mitigation, and that same "obligation" meant that the jury should return whatever verdict it reached as a result of that weighing process, rather than arbitrarily rejecting it and returning a verdict which was

not the product of its weighing process. The prosecutor further noted that "it can be a slight outweigh," but again the verdict to be returned was for the jury's ultimate determination.

As the California Supreme Court concluded on this point:

"Although the prosecutor argued that the jury was obliged (i.e., it 'shall') to return a death verdict if it found that the aggravating factors outweighed the mitigating even slightly, he also told the jury that its ultimate determination was: 'Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty.' In his final summation, the prosecutor stated, 'and the point now becomes, and the only question is, should it [the death penalty] be or should it not be imposed.' Defense counsel also made it clear the ultimate penalty was the jury's choice: 'Can (k) outweigh (a) through (j)? If you find that it does, it does, and that is your choice. That is what we are asking you to do.'"

(People v. Boyde, supra, 46 Cal.3d at p. 253.)

Petitioner further relies on statements to certain jurors during individual sequestered voir dire prior to the start of trial. However, as the California Supreme Court observed, to the extent they deserve consideration at all (since they came during voir dire examination of individual jurors at the outset of the case, before the jury had been instructed on the law by the court) the comments, considered in context, were the result of "the prosecutor's contrasting the current death penalty law with the former one that was unconstitutional for lack of standards governing the jury's exercise of discretion in sentencing. (See Furman v. Georgia (1972) 408 U.S. 238.) He was attempting to explain that the current law does not leave jurors 'rudderless,' but instead provides concrete standards to guide the jury's exercise of discretion." (People v. Boyde, supra, 46 Cal.3d at p. 254 (fn. 6.)

The prosecutor's concern was that the jury exercise its discretion within the guidelines of the law, rather than in some arbitrary fashion which was not the result of the weighing process prescribed by California law.

The California Supreme Court correctly concluded in this regard:

"The dissent also mistakenly faults the prosecutor for urging the jurors to base their decision on the evidence presented as measured by the guidelines set forth in the court's instructions rather than by simply consulting their personal feelings. The prosecutor's exhortations did no more than urge the jurors to limit the 'sentencing considerations to record evidence,' a completely proper request according to the United States Supreme Court in California v. Brown, supra, 479 U.S. at page ____ [93 L.Ed.2d at p. 941.]. We find no impropriety in such argument. It is a misinterpretation of the prosecutor's argument to assert, as the dissent does, that he was telling the jury it had no discretion to determine the appropriate penalty. We conclude that the jury was adequately informed that the manner in which it weighed mitigating versus aggravating circumstances was in its sole discretion and that it thereby determined whether death was appropriate." (People v. Boyde, supra, 46 Cal.3d at pp. 254-255.)

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THE INSTRUCTIONS PROVIDED THE JURY WITH
GUIDED DISCRETION IN DETERMINING THE
APPROPRIATE PENALTY, AND DID NOT PREVENT THE
JURY FROM CONSIDERING ANY MITIGATING EVIDENCE
IN THIS CASE

Petitioner next contends that the jury was improperly restricted by CALJIC 8.84.1 in its consideration of circumstances in mitigation of penalty, in violation of principles expressed in Lockett v. Ohio (1978) 438 U.S. 586. Petitioner argues that the jury instruction he challenges is improper, because it refers to "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," and thereby purportedly precluded the jury from considering evidence in mitigation which related to petitioner's background and character.

Petitioner's contention involves an unduly narrow construction of the instruction and of California law, and ignores the fact that the California Supreme Court concluded that petitioner's jury could not have been misled under the particular circumstances of petitioner's case, since the only defense evidence before the jury on penalty consisted of background and character evidence.

Here, the jury was first told in CALJIC 8.84.1 ("penalty trial--factors for consideration") that in determining penalty it was to consider "all of the evidence which has been received during any part of the trial of this case." (CT 541; RT 4831.) The jury was then told in the same instruction ^{2/} to

2. CALJIC No. 8.84.1, as given in the instant case, provided:

"In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied

consider a list of several possible aggravating or mitigating circumstances, as well as any other circumstances which extenuated the gravity of the crime whether or not they might technically constitute "a legal excuse" for the crime. (CT 541-542; RT 4832-4833.) The jury was further told in the very next instruction that "extenuate" "means to lessen the seriousness of a crime as by giving an excuse." (CT 543; RT 4833; emphasis added.)

Consideration of compassion as a mitigating factor was, therefore, expressly allowed. The jury knew it could consider "any" possible circumstances in mitigation under the catch-all "factor (k)" portion of the instruction, even circumstances that did not constitute any kind of "legal excuse" for the crime. A

threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or expectation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (See, Cal. Pen. Code, § 190.3.)

review of Lockett v. Ohio, supra, 438 U.S. 586, demonstrates why this instruction was constitutionally appropriate.

Lockett v. Ohio, supra, in a plurality opinion, held that the Ohio death penalty statute was unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution because the statute required the death penalty where one or more factors in aggravation were proven unless outweighed by evidence in mitigation, which had to fit within one of three specific categories. Lockett compared the Ohio statute with those upheld in Gregg v. Georgia (1976) 428 U.S. 153, and Proffitt v. Florida (1976) 428 U.S. 242, and found that the Ohio Statute, in contrast to those in Gregg and Proffitt, violated the Eighth and Fourteenth Amendments since it precluded the consideration as a mitigating factor of any relevant aspect of the defendant's character or record or any of the circumstances of the offense. (Lockett v. Ohio, supra, at pp. 604-607.)

In contrast to the instruction in Lockett v. Ohio, supra, the jury instruction in the instant case, CALJIC No. 8.84.1, meets the constitutional standards set forth in Lockett, supra. The Ohio statute in Lockett contained eight fewer categories and completely lacked the kind of catchall category contained in section (k). In its first sentence, CALJIC No. 8.84.1 instructs the jury that the mitigating factors are essentially unlimited since they can be derived from "all of the evidence which has been received during any part of the trial of this case. . . ." (Emphasis added.) In addition, the eleventh of the special categories given to the jury (section (k)) is a broad catchall category providing that the jury can consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Emphasis added.) These factors necessarily include the offender and compassion.

Furthermore, California v. Ramos (1983) 463 U.S. 992, found no constitutional infirmity in California Penal Code section 190.3. Since the wording of that code section is

identical to the wording of CALJIC No. 8.84.1(k), the instruction likewise does not violate Lockett. The language of the instruction necessarily allows the jury to consider the offender and compassion since the jury sets the penalty after considering mitigating factors drawn from all evidence and "any other circumstance" in mitigation, whether or not it constitutes "a legal" excuse.

Thus, unlike the situation in Lockett, in California the jury can consider any of the evidence presented at any phase of the trial and any extenuating circumstance as factors in mitigation. Certainly, compassion and the individual worth of the defendant fall within this catchall category of section (k). The instruction allowed the jury to treat petitioner as an individual. (See, Lockett v. Ohio, supra, 438 U.S. at p. 605.) It did not prevent the jury from considering any relevant, mitigating evidence in the case. (See, Franklin v. Lynaugh, supra, 101 L.Ed.2d at p. 160.) Thus, there was no risk the death penalty would be imposed in spite of the hypothetical existence of factors allegedly calling for a less severe penalty.

Moreover, petitioner's contention ignores the determination of the California Supreme Court that petitioner's jury could not reasonably be thought to have been confused about this matter since the jury was expressly instructed to consider "all of the evidence which has been received during any part of the trial of this case" in determining whether there were factors in mitigation, and since "[a]ll of the defense evidence at the penalty phase related to Boyde's background and character." (People v. Boyde, supra, 46 Cal.3d at p. 251.)

Petitioner offered over two volumes of evidence in his behalf at the penalty phase, including evidence that he had a deprived childhood, was of low intelligence, a hard worker, a good husband and father and generous to his friends. Evidence was also received in his behalf at the penalty phase from a psychologist who testified he was not the type of person who would deliberately kill another. (RT 4301-4746.)

As the California Supreme Court concluded, it is "inconceivable" (People v. Boyde, supra, 46 Cal.3d at p. 251) that the jury could have ignored all the evidence presented by the defense at the penalty phase, in violation of the court's express instruction to consider all the evidence before it. Moreover, as the California Supreme Court further noted,

"Although the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence could not be considered. Defense counsel argued at length for giving great weight to defendant's troubled background and personality deficiencies and referred to factor (k) as the catchall provision. It is inconceivable the jury would have believed that, though it was permitted to hear defendant's background and character evidence and his attorney's lengthy argument concerning that evidence, it could not consider that evidence." (People v. Boyde, supra, 46 Cal.3d at p. 251.)

* * *

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
STEVE WHITE, Chief Assistant
Attorney General
MAXINE P. CUTLER,
Supervising Deputy Attorney General

Frederick R. Millar, Jr.

FREDERICK R. MILLAR, JR.,
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Attorneys for Respondent

FRM:eu
SD89XU0001

APPEARANCE FORM
SUPREME COURT OF THE UNITED STATES

No. 88-6613

RICHARD BOYDE
(Petitioner or Appellant)

vs.

THE STATE OF CALIFORNIA
(Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for RESPONDENT,

STATE OF CALIFORNIA

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae
☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Frederick R. Millar, Jr.

(Type or print) Name FREDERICK R. MILLAR, JR.

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm CALIFORNIA ATTORNEY GENERAL

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No: 88-6613
October Term, 1988

JOHN K. VAN DE KAMP
Attorney General of
the State of California
FREDERICK R. MILLAR, JR.,
Spvg. Deputy Attorney General

RICHARD BOYDE,

Petitioner,
v.

110 West A Street, Suite 700
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STATE OF CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within RESPONDENT IN OPPOSITION as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 9 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Dennis A. Fischer
Counsel of Record
1448 Fifteenth Street, Suite 104
Santa Monica, California 90404

William E. Conerly, Clerk
Riverside County
4050 Main Street
Riverside, California 92501

John M. Bishop
18775 Bert Road
Riverside, California 92504

Grover C. Trask, II
District Attorney
Riverside County
4080 Lemon Street, Ste. 200
Riverside, California 92501

Attorneys for Petitioner

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 6 day of March, 1989.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

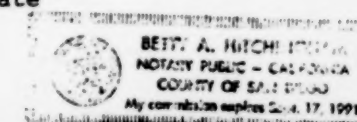
I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March, 6th, 1989.

Eileen Unsworth
EILEEN UNSWORTH.

Subscribed and sworn to before me
this 6 day of March, 1989.

Betty A. Hitchcock
Notary Public in and for said County and State



JUL 27 1989

JOSEPH F. SPANIOLO, JR.
CLERK

No. 88-6613

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD BOYDE,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the
Supreme Court of California

JOINT APPENDIX

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**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

March 23, 1981—Information filed against defendant Boyde in the Superior Court of the State of California in and for the County of Riverside.

Sept. 28, 1981—Amended information filed.

Jan. 11, 1982—Jury trial commenced.

March 10, 1982—Jury rendered guilt phase verdicts in favor of plaintiff.

March 15, 1982—Penalty phase of trial began.

March 30, 1982—Jury returned verdict imposing death.

April 20, 1982—Superior Court denied motions for new trial and to reduce penalty and entered judgment of death.

August 11, 1988—Supreme Court of California affirmed judgment.

Nov. 9, 1988—Rehearing denied.

Jan. 4, 1988—Stay of Execution pending instant proceedings granted by Supreme Court of California.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF RIVERSIDE

No. CR. 18348

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

RICHARD BOYDE, CARL FRANKLIN ELLISON,
Defendant(s).

AMENDED INFORMATION

COUNT I

The District Attorney of the County of Riverside hereby accuses RICHARD BOYDE of a violation of Section 211 of the Penal Code, a felony, in that on or about January 5, 1981, in the County of Riverside, State of California, he did wilfully and unlawfully and by means of force and fear take personal property from the person, possession, and immediate presence of DAVID ANDREW BAKER.

The District Attorney of the County of Riverside further charges that in the commission and attempted commission of the offense hereinabove set forth in Count I of the Amended Information, the defendant(s), RICHARD BOYDE, personally used a deadly and dangerous weapon, to wit, a KNIFE, said use not being an element of the above offense, within the meaning of Penal Code Section 12022(b).

COUNT II

For a further and separate cause of action, being a different offense from but connected in its commission with the charge(s) set forth in Count(s) I hereof, the District Attorney of the County of Riverside hereby accuses RICHARD BOYDE of a violation of Section 209, Subdivision (b) of the Penal Code, a felony, in that on or about January 5, 1981, in the County of Riverside, State of California, he did wilfully and unlawfully kidnap and carry away DAVID ANDREW BAKER to commit robbery, and did aid and abet such act.

The District Attorney of the County of Riverside further charges that in the commission and attempted commission of the offense hereinabove set forth in Count II of the Amended Information, the defendant(s) RICHARD BOYDE, personally used a deadly and dangerous weapon, to wit, a KNIFE, said use not being an element of the above offense, within the meaning of Penal Code Section 12022(b).

COUNT III

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge(s) set forth in Count(s) I and II hereof, the District Attorney of the County of Riverside hereby accuses RICHARD BOYDE and CARL FRANKLIN ELLISON of a violation of Section 211 of the Penal Code, a felony, in that on or about January 15, 1981, in the County of Riverside, State of California, they did wilfully and unlawfully and by means of force and fear take personal property from the person, possession, and immediate presence of DICKEE LEE GIBSON.

The District Attorney of the County of Riverside further charges that in the commission and attempted commission of the offense hereinabove set forth in Count III of the Amended Information, a principal in said offense was armed with a firearm, to wit, at .22 CALIBER PISTOL, said arming not being an element of the above

offense, within the meaning of Penal Code Section 12022 (a).

The District Attorney of the County of Riverside further charges that in the commission and attempted commission of the offense hereinabove set forth in Count III of the Amended Information, the said defendant(s), RICHARD BOYDE, personally used a firearm, to wit, a .22 CALIBER PISTOL, within the meaning of Penal Code Section 12022.5.

COUNT IV

For a further and separate cause of action, being a different offense from but connected in its commission with the charge(s) set forth in Count(s) III hereof; the District Attorney of the County of Riverside hereby accuses RICHARD BOYDE and CARL FRANKLIN ELLISON of a violation of Section 209, Subdivision (b) of the Penal Code, a felony, in that on or about January 15, 1981, in the County of Riverside, State of California, they did wilfully and unlawfully kidnap and carry away DICKEE LEE GIBSON to commit robbery, and did aid and abet such act.

The District Attorney of the County of Riverside further charges that in the commission and attempted commission of the offense hereinabove set forth in Count IV of the Amended Information, a principal in said offense was armed with a firearm, to wit, a .22 CALIBER PISTOL, said arming not being an element of the above offense, within the meaning of Penal Code Section 12022 (a).

The District Attorney of the County of Riverside further charges that in the commission and attempted commission of the offense hereinabove set forth in Count IV of the Amended Information, the said defendant(s), RICHARD BOYDE, personally used a firearm, to wit, a .22 CALIBER PISTOL, within the meaning of Penal Code Section 12022.5.

COUNT V

For a further and separate cause of action, being a different offense from but connected in its commission with the charge(s) set forth in Count(s) III and IV hereof, the District Attorney of the County of Riverside hereby accuses RICHARD BOYDE and CARL FRANKLIN ELLISON of a violation of Section 187 of the Penal Code, a felony, in that on or about January 15, 1981, in the County of Riverside, State of California, they did wilfully, unlawfully, and with malice aforethought murder DICKEE LEE GIBSON, a human being.

The District Attorney of the County of Riverside further charges that in the commission and attempted commission of the offense hereinabove set forth in Count V of the Amended Information, a principal in said offense was armed with a firearm, to wit, a .22 CALIBER PISTOL, said arming not being an element of the above offense, within the meaning of Penal Code Section 12022 (a).

The District Attorney of the County of Riverside further charges that in the commission and attempted commission of the offense hereinabove set forth in Count V of the Amended Information, the said defendant(s), RICHARD BOYDE, personally used a firearm, to wit, a .22 CALIBER PISTOL, within the meaning of Penal Code Section 12022.5.

The District Attorney of the County of Riverside further alleges that the murder of DICKEE LEE GIBSON was committed by defendant(s) RICHARD BOYDE and CARL FRANKLIN ELLISON while the defendant(s) were engaged in the commission of, attempted commission of, and immediate flight after committing and attempting to commit the crime of ROBBERY in violation of Section 211 of the Penal Code, within the meaning of Penal Code Section 190.2(a)(17)(i).

The District Attorney of the County of Riverside further alleges that the murder of DICKEE LEE GIBSON

was committed by defendant(s) RICHARD BOYDE and CARL FRANKLIN ELLISON while the defendant(s) were engaged in the commission of, attempted commission of, and immediate flight after committing and attempting to commit the crime of KIDNAPPING in violation of Section 207 of the Penal Code and the crime of KIDNAPPING FOR ROBBERY in violation of Section 209 of the Penal Code, within the meaning of Penal Code Section 190.2(a) (17) (ii).

PRIOR OFFENSE:

The District Attorney of the County of Riverside further charges that said defendant, RICHARD BOYDE, was on or about August 26, 1976, in the Superior Court of the State of California, for the County of Riverside, convicted in Case No. CR. 13964 of a violent felony, to wit, ROBBERY, a felony in which the defendant used and was charged and proved to have used a knife within the meaning of Section 12022.A of the Penal Code, in violation of Section 211 of the Penal Code, and additionally convicted in Case No. Cr. 13967 of the crime of ROBBERY, a felony, in violation of Section 211 of the Penal Code and in Case No. CR. 13962 of the crime of KIDNAPPING, a felony, in violation of Section 207 of the Penal Code, and that he then served a separate term in state prison for said offense(s), and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of ten years subsequent to the conclusion of said term, within the meaning of Penal Code Section 667.5(a).

BYRON C. MORTON
District Attorney

By: /s/ Edward D. Webster
EDWARD D. WEBSTER
Deputy District Attorney

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF RIVERSIDE

(Caption Omitted in Printing)

REPORTER'S TRANSCRIPT ON APPEAL

* * * *

**EXCERPT FROM VOIR DIRE EXAMINATION OF
JUROR JOAN BREEDING**

[580] [Prosecutor] Q. The way the system works, or the way it's been set up is there was a problem with old death penalty laws, about them being applied in a freakish or an unpredictable way.

[581] Essentially jurors were given a defendant and given a case and virtually no guidelines as to what the penalty should be.

Now, the way the law is now, you are going to be given certain aggravating and mitigating factors. That's what they are called, aggravating and mitigating.

A. Right.

Q. And it will be your job to evaluate the evidence presented not only at trial, but at the penalty portion, if we get there, and you will weigh the evidence and decide whether or not the aggravating circumstances outweigh the mitigating.

A. Right.

Q. If the law directs you to a verdict of death, even though given your druthers and your idea of what the crime is worth, disagreeing with that, you are still obligated to follow the law even if the consequence is ultimately death.

A. I understand that, also. I understand that the decision isn't based on where I think it is appropriate.

Q. Right.

A. No. I understand that.

Q. It is essentially going to be a legal decision based upon rules given to you.

A. Right.

Q. Any problem with that format?

A. I personally don't even know when it is appropriate and when the law says it is. I don't know that. So, those cases where I feel that it is appropriate, just my [582] own personal—my own personal feelings. So that doesn't enter into it.

Q. I think I come from about the same place that you do, in that I would feel uncomfortable if I didn't have any guidelines.

A. Uh-huh.

Q. And I feel much better that I am told this is what is expected of me, and I think what you are telling me is you are willing to enter into that wholeheartedly, and you don't have any reservations—

A. No, I don't.

Q. —about applying the law?

A. About applying the law, no, I don't.

Q. Even if the final result of your application may be the death penalty?

A. Right.

Q. And given that's not by the same token, even if you go through the evidence and clear up the mitigating factors and they outweigh the aggravating, you will be told it is your duty to come back with a verdict of life without parole?

A. I understand.

Q. You don't have any trouble with that either?

A. No.

Q. It is the decision you are going to have to make, obviously.

A. I know.

. . . .

EXCERPT FROM VOIR DIRE EXAMINATION OF JURY FOREMAN EDWARD ARMAS

[1158] [Prosecutor] Q. All right, the next question is, when you sit as a juror, what's happening is you are taking an oath, essentially, to follow the law of the State of California and apply it to the facts as you interpret the facts of the case. And, that requires you to apply that law even if you disagree with that law in a particular case.

Do you understand?

A. Yes.

Q. Do you have any problem with that idea?

A. No.

Q. You understand that what you are doing, is, [1159] we have a system of government where certain laws get passed either by the representatives of the people or through an initiative process, and that is the law as it is given and we can't have a lot of people up here as jurors, sitting there and now debating whether they like the law or not like the law.

A. Right.

Q. It is kind of the inappropriate place.

The situation becomes most difficult, I think, when you are dealing about a question of life and death. The question as to whether or not the Defendant should get the death penalty or should not get the death penalty. Because the way the law is set up now, it is a very strict structure, there are a list of about nine or ten factors that you are to look at in deciding whether the death penalty should be imposed or whether life without possibility of parole should be imposed.

And, I believe it is quite possible that you, personally, if you were writing on a blank slate or writing the law yourself would, in a particular case, not think the death penalty was appropriate, but yet the law says it is.

A. Uh-huh.

Q. Will you be able to go along with the law?

A. Yes.

Q. Okay, this is a rule of law, not of people; and, if you substitute your personal ideas for the law, you are frustrating the will of society which you are a member of.

A. Right.

Q. Any problem with that idea?

[1160] A. No.

Q. I think it also, I don't know, but if I was sitting on a jury such as this, for me to recognize that what I am essentially doing is apply the law as it as been passed and that I am not personally deciding whether or not I like the Defendant, don't like the Defendant, whether I personally think he should die or not die. I find it far easier or I find it, at least for my peace of mind, a better way to do it, then in fact what I am doing is applying the law.

A. Yes, that is the same thing I was thinking, just kind of remove yourself from—

Q. That's right, see we are not—there is going to be some evidence in this case, this was a very horrible crime and there may be a tendency for you to become very upset at this particular Defendant because of the crime.

By the same token, when you get down to the penalty portion of the trial and the victim starts to fade in the past because its been awhile since you heard about the circumstances of the killing and you are only looking at the Defendant, you may tend to start forgetting the victim and that kind of sympathy and emotion rises and falls as how you feel; but, that is not how you make the decision.

What we are trying to do is insure a rational reasoned decision as best we can do this question.

I think we are both talking about the same thing.

A. Right.

* * *

[1161] Q. Surprisingly, the law is basically a reflection of our common experience and we try to put it into certain formulas to help guide.

* * *

EXCERPT FROM VOIR DIRE EXAMINATION OF PROSPECTIVE JUROR ELAINE WARNE

[1482] [PROSECUTOR] Q. And, the law is rather specific, it says that you will consider various factors on each side and then when you have determined whichever is the greater, that's the way you decide.

The terms that they use are: if the factors in aggravation outweigh factors in mitigation, it's the death penalty; and, conversely, it's life without possibility of parole.

You put them on the scale and weigh them and read the balance, so to speak.

Now, we understand that this is one of the most serious and grave responsibilities anyone could have, and it is kind of hard to project you into that so early in this case without hearing any evidence or anything; but, if you can kind of put yourself in a position where you have heard all of the evidence and now you are placed in a position of weighing the various factors on each side and realizing the consequence of your final decision, do you feel that you could return a verdict that would result in the death penalty, that you, personally?

A. No, I don't think so.

Q. You feel that your feelings are such that you would vote for life in prison without the possibility of parole?

A. I'm afraid so, yes.

Q. And that would be an automatic response regardless of [1483] the circumstances?

A. It's hard to say; but, right now I can say with certainty that I couldn't—

Q. That you couldn't under any circumstances return a verdict that would result in the death penalty?

A. That's the way I feel right now, yes.

* * *

[1485] [DEFENSE COUNSEL] Q. And as you listen to the evidence and you appraise it, and you weigh

it, you finally come to a point where you say I think the evidence in aggravation outweighs the evidence in mitigation, and if you make that finding, the law mandates that you come in with a finding of death, no matter what your personal feelings may be.

On the other side of the coin, if you weigh the evidence in mitigation and it comes out in your opinion [1486] outweighing aggravation, the law mandates that you come in with life without possibility of parole. So, you are in a sense balancing the evidence. I think what the Judge is really at bottom trying to get to with his questions is this.

You are sitting there, you are listening to the evidence, you have gone through this process. Would your feelings against the death penalty be such that even though the aggravating factors in your opinion outweigh the mitigating factors, you still couldn't impose the death penalty?

A. No, I don't think I could.

* * *

[1487] [PROSECUTOR] Q. All right. Let me put you in the situation, you are going to take an oath, if you sit as a juror, and you are going to be swearing to follow the law, essentially you are going to be swearing to impose the law of the State of California, and whether we like the law or dislike the law, if you sit as a juror, you have to follow that law.

And that law says very clearly if the aggravating, [1488] as they are laid out in the law, outweigh the mitigating factors, you shall vote the death penalty, no choice about it.

If you decide to sit as a juror and the law directs you there, even if you personally don't think the crime is worth it, even if you don't think you personally would do it, if you sit as a juror, you are going to have to do it, the law says so, even if you disagree with it.

The question would be—and if you don't do that, you are not following the law, you are violating your oath, your duty as a juror, so you have to say now, yes or no.

Would you be able to follow that law even if in that case you disagree?

A. No, I couldn't do it. I would have to disobey.

[Whereupon Ms. Warne was excused from service for cause.]

* * *

EXCERPT FROM VOIR DIRE EXAMINATION OF JUROR GERALD HART

[1826] [PROSECUTOR] Q. Okay. By the same token at the very end it has got to be your decision, you know, it is your considered opinion. Just because a certain number of other people feel the other way, if you are not convinced of the logic of that argument, obviously you have got to stick to your own conscience and your own thought process.

No problem there?

A. No.

Q. You said you worked on a couple of political campaigns; is that correct?

A. Yeah.

Q. Okay. And I think you also said, as Defense attorney was asking you questions, that the place to change the law is not with the jury, it is up in Sacramento?

A. Legislation.

Q. You are going to be given the law of the State of California. The Court is going to read it to you, you are going to be asked to apply that. In fact, you are going to take an oath to apply it, and that means that you are not going to spend a lot of time discussing whether you like the law or how you would change the law, or whether this is a good law or bad law. That is not—this isn't the appropriate place to do that.

And so, it is a real possibility that a rule of law may be propounded to you that you don't like or that you

disagree with, but you still will have to follow it as a juror.

[1827] You think you would be willing to do that?

A. Yeah.

Q. And so, the death penalty is one of the laws of the State of California, and the people have spoken and said that in certain circumstances the death penalty is not only the appropriate punishment, but it is the only punishment that should be applied in certain situations.

Any problem with that?

A. No.

Q. There will be a list of, I think, nine or ten factors that you will have to guide you as you approach the evidence and you will be told that if you find the factors in aggravation outweigh those in mitigation, that you shall return a verdict of death. Doesn't say you may, doesn't say it is one of your choices, it says you shall return a verdict of death.

Any problem with that?

A. No.

Q. What if you are faced with a situation, though, where you personally, if you had to write on a blank slate, would not make this crime a death penalty crime, yet as you go through the factors it is clear to you that the law requires that verdict.

Can you put your own thoughts aside and follow the law?

A. Yes, I could.

Q. Even on a question like this, which is possibly life or death?

[1828] A. Yes, I could put it aside.

Q. I am not saying that will happen. You will be surprised as to how logical these factors actually are, how they are almost identical with the things that you would look to in judging how serious the crime is and I would imagine that, in fact, you probably would end up agreeing that is the way it should be done, that it should be a logical and a consistent imposition rather than

throwing it to the twelve people with no guidance and say, hey, this is your problem now, you do what you want to do. I don't know about you, but I think I would much rather have guidance in this area to help me decide.

By the same token, if the same factors, say, life without possibility of parole, that will be your obligation to return that verdict, even if you are outraged at the grossness of the crime.

You are willing to do that?

A. Yes.

Q. You may—I believe that there will be, if you do get to that part of the trial, there will be certain emotions that will be coming to the floor with certain of the jurors. I think it is inevitable. They will see the Defendant sitting there, they will not remember as well the victim in the case or that will be the evidence earlier on. They will be looking at him, worrying about him, saying we can't do anything for Mr. Gibson, but this poor person here is sitting here and we are going to put him in prison at the very least for the rest of his life, we are not going to see [1829] him again. It is not going to be our problem, why don't we make that choice, that way we won't be responsible for someone's death.

The problem is that is not the way the law says to do it. The law says, favors neither punishment. The way the decision should be weighed is by weighing the factors, not doing what you would find easier or more convenient or more emotionally satisfying.

You think you can be alert to that, not let yourself be taken in by that trap?

A. I am pretty sure.

Q. If somebody starts to do that as a juror obligated to follow the law, you have not only the right but the obligation to bring it to their attention and tell them, ask them if that is what they are doing and call them on it.

You would be willing to do that?

A. Yes.

Q. Okay. Another thing that is interesting that might happen is in the guilt portion of the trial you are going to be deciding a person's guilt in this case of very serious crimes, robbery, kidnapping for purposes of robbery, robbery and murder, and sometimes jurors feel guilty or feel responsible or feel bad after they convicted a person of those kind of crimes. It is amazing, sometimes it happens. Even though the evidence becomes very clear, they are convinced they made the right decision, they still feel bad about imposing that on another person. Those feelings then sometimes carry over into the penalty consideration in the [1830] case and it effects how they view the evidence in the penalty portion. It is important that that not happen, that your feelings of sympathy or those kind of feelings not be the basis for making these kinds of decisions.

You know, today you may feel one way, tomorrow you may feel another way. They are so changeable, they are not the kind of solid rock to base this kind of decision on.

Any problem with that?

A. No.

Q. You know it works both ways for sure.

At some point there is going to be a lot of sympathy for Mr. Gibson, his family, for the other victim that you are going to hear about, the 1976 case, so, just because you like those victims, you feel bad that they had to go through what they went through, it is just too chancy a proposition to rely upon that for a decision.

As long as a person is aware of it they can usually deal with it. But, if you are not aware of it, sometimes it will come up and bite you.

Any problems with that?

A. No.

* * *

EXCERPT FROM VOIR DIRE EXAMINATION OF JUROR DONNA ASH

[1976] [PROSECUTOR] Q. The death penalty is kind of a tough question and people think, you know, "if I vote for the death penalty I am personally the one who is actually going to be executing somebody," they get very personally involved.

And, there was a time, maybe, oh, eight or nine years ago where we used to just throw the case to the jury and they could decide for whatever reason they wanted to whether they wanted to give the death penalty or life without possibility of parole, with no guidelines at all.

I mean, it could be Monday, it could be Tuesday. You know, decisions might be different.

The courts decided that that was too strange and too unpredictable and unfair. If you were the one on Tuesday that got the death penalty and not the one on Monday who didn't get the death penalty, you would be real upset that you didn't have your trial on Tuesday.

A. Right.

Q. So, what they have done is created a lot of things to look at, about nine or ten factors. And, essentially what you do is you take that evidence plug it into the factors, and if you find that the ones that make the crime worse, those that aggravate it, outweigh the others you shall return a death penalty. If you find, on the other hand that the factors in mitigation, make it less serious, outweigh it, you shall return a verdict of life without [1977] parole.

Essentially, you are making a legal decision, you are trying to apply the law of the State of California, trying to do essentially the will of the people in deciding what is the appropriate penalty, what they have said to be the appropriate penalty in this case. So, it is not so much you, personally, it is what you think the law requires.

A. Uh-huh.

Q. I think it is a better way, I would be much more satisfied sitting as a juror in that situation, I trust that you would, too.

But, what it may mean is it may mean that you personally if you had it to do all over again, would not write the law that way. It might mean, "Well, I don't think this crime deserves the death penalty," yet as you look at what the factors are, you may be required to return a penalty of death.

Can you put aside what you personally feel and follow the law even in that situation?

A. I think I could.

Q. You understand how important it is because if we talk to twelve people we could get twelve different ideas as to what the standard should be or what the law should be.

A. Right.

Q. And we can't spend days, years, tens of years trying to figure out if we like the law and if we are going to apply it.

[1978] We just can't do that, especially with jurors. So, what we require is we require you, when you take the oath to be a juror, to be willing and in good faith to apply the law, and that means assuring us that if you disagree with the law that you will still apply it.

I am not saying you are going to I am just saying that's a possibility.

A. I think I could.

Q. There is also the other side of it. The other side of it could be—this could be the most outrageous thing you ever heard in your life. This is the most horrible thing a person could do to another human being; yet, for some strange reason the people of the State of California said that for this crime the penalty should be life without possibility of parole and you think death is appropriate, you will have to go with life without possibility of parole, it is real important.

A. Uh-huh.

Q. I wouldn't be surprised as you listen to the instructions, because at the end of the case it will probably take an hour for the Court just to read them to you, for you to disagree with them or wonder why certain things are the law.

Frequently jurors don't have all the information or don't know everything that went into making this particular law, weren't there when they had the committee hearings, when that was talked between the legislators. So, frequently it is a good law and you may not even know why [1979] it is a good law.

Do you see what I mean?

A. Yes.

Q. So, you have to apply it whether you like it or not. And, if you just would tell me that you think you can, I have to take your word for it because I can't get any closer—

A. Right, but I feel that I think I can.

Q. That is all we need and that is all we are looking for, just the honest belief that you can do that.

One thing I want to alert you about is that if you get to the penalty portion of the trial, this thought might come to your mind, "okay, I have got two choices, one is the death penalty and the other is life imprisonment without the possibility of parole," and if you think about it, life imprisonment without the possibility of parole means that that person is going to be removed from society, you are not going to see him again, he is not going to be a problem on the streets, he is going to be in an institution and he is going to be their problem.

That is a very severe punishment for someone and someone might say, "well, that is as good as the death penalty because he is not going to hurt anybody else."

The problem with that is if you make that kind of logical reasoning process is that you are not following the law because what you are doing is you are taking the easy way out because you don't want to face the tough question and you don't approach the factors like

you should. Even [1980] though you may know that you still may be required to vote the death penalty if that is what the factors say.

A. Uh-huh.

Q. And it is really important that you understand that; and, not only that, if you see someone else doing that on the jury, bring it to their attention and in a very polite way say, "Do you think that is what you are doing because you are not talking about the factors and you have taken an oath to follow this law."

A. Uh-huh.

Q. Okay, and it is real important because, I mean, it really may get to that, where you may have to tell somebody that or you may have to be aware of it in yourself to recognize that is what you are doing and say, "I am not going to do it."

A. I believe I could, yes.

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EXCERPT FROM PROSECUTOR'S OPENING PENALTY PHASE ARGUMENT

[4766] Here it is again, "After having heard all of the evidence and having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed."

"You shall consider, take into account and be guided," that is the direction and those are the actual circumstances, and I will go through those with you in a moment.

[4767] Then the test is whether aggravating outweighs mitigating or mitigating outweighs aggravating. There is no requirement that I have to prove that the aggravating outweighs beyond a reasonable doubt, beyond clear and convincing evidence. The test is whether, when you weigh the two, do the aggravating factors outweigh the mitigating factors or vice versa.

If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death.

There is no requirement here that the aggravating be beyond a reasonable doubt over the mitigating before you can return the death penalty, it is merely a question of weighing.

And the instruction is that you shall do that after you've considered it.

The process of weighing, I think, is a rational process, it is a process of being able to go through each factor, decide whether or not it aggravates or mitigates, and consider that factor in relation to the other factors that you'll hear, and come to a rational decision. It is not a question, I believe, that should be guided by emotion, sympathy, pity, anger, hate or anything like that because it is not rational if you make a decision on that kind of a basis.

(NO OMISSIONS)

[4768] It has got to be logical, it has to be some kind of consistency, some kind of basis that a person can understand why they are being punished in this way for this conduct, not only as a guide to that person, but as to everybody else who functions in society, so we know what to expect.

Here are the factors. I set them out in my opening statement, and the factors are now again put on the board for you. These are the things you will consider. Take a moment and read them, if you would, please. There are eleven separate factors that you should consider.

You will note that nothing on that instruction tells you which factors are more important than other factors. Nothing in that instruction tells you what specifically is aggravating or mitigating as opposed to what is not.

* * *

[4772] All six of these factors so far surely point to aggravation.

You know, you worry, you worry you see it the same way someone else does. I invite each of you as you go to the jury room to try to think of it in terms of mitigating [4773] circumstance, I don't see how you can.

* * * *

[4775] Then the last one, it seems to me that before you [4776] even get to the last factor, all right, you've got ten solid factors in aggravation here, ten solid factors.

A more clear-cut case I'm not sure you could want, expect or I wouldn't even know how to even begin to imagine it or to even imagine the kind of evidence that you would want. Perhaps you would want three or four persons killed at the same time, perhaps you would want a sex offense at the same time; but, is it really necessary, is it really anything more outrageous than what happened here, I don't think so.

Then we come to, "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

"Any circumstance which extenuates the gravity of this crime" and what we have heard about this Defendant is that he persistently lies, he's got a low tolerance for frustration, he lacks patience, shows little or no effort to work in his life or contribute constructively to anything.

He steals by inclination, he's arrogant, he assaults by inclination, he's gotten an inflated sense of self-importance, he achieves gratification at having control over others. He has an anti-social personality disorder and has a narcissistic personality disorder. He was that way at sixteen, he was confirmed by the time he was twenty-four or twenty-five, and he will be antisocial at thirty, forty, and fifty. There is no reasonable possibility that this man is going to change.

You know, we've heard a lot from his family, from psychologists as to why he is the way he is now. How did he get to this point in time?

[4777] All of us have gotten to this point in time through some manner or another, we have all arrived at it through these different paths, but here we are now at this point in time and you are asked to consider whether what you have heard about this Defendant extenuates in any way the gravity of this crime, and I would suggest it does not.

You know, we are all, to a degree, I guess, in some way a product of our past; but, at some point we all have to assume responsibility for what we do, we are held to be personally responsible. The law requires it, the foundations for punishment, for requiring a person to conform to society by us expecting another person not to hit us, is all founded on the idea that people have responsibility for what they do.

You can speculate for hours as to exactly why this man is the way he is. Was it because of his birth, was it because of his childhood, was it because he was spoiled, was it because the counseling didn't take, why?

You could go on for hours thinking about it or discussing it; but, nothing that I have heard there relieves or extenuates in any way the seriousness of this particular crime. And, to sit there and place the blame on his family, on the society, on you and me, begs the question. We start that he is responsible for what he does and we have to start at that point in time and we have to be able to hold him as such.

You're not dealing with a juvenile, you're not dealing with a person who has not had this brought home to him. [4778] He has been incarcerated. The man understands the criminal justice system better than any of you on this jury do, as well as law enforcement as well as I do.

He understands it, he's been through it. He recognizes the worst that can be done to him. He knows, and still

he went out and did this particular crime and now he asks, through his attorney, to not be held responsible for it.

Now, I ask you, does this in any way relieve him or does that in any way suggest that this crime is less serious or that the gravity of the crime is any less; I don't think so.

* * * *

[4779] The important thing is this personal commitment that you have here to be willing to follow the law and to put aside what you would like to do for your own, you know, your own feeling of feeling good about it.

Well, I am asking you now to follow the law as it is given to you by the Court and apply it to the evidence as presented. You took an oath to do that, if you do do that conscientiously and honestly do that and recognize that you do it to yourself, you serve both yourself and this society, and I can ask nothing more, this Defendant and his Defense Attorney and this Court could ask nothing more.

But, don't try to avoid the tough decision by sitting and trying to rationalize or trying to seek a way out of a tough decision, you are going to have to face it head on, you [4780] are going to have to go through each and every one of those factors and decide it. Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty.

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EXCERPT FROM DEFENSE COUNSEL'S OPENING PENALTY PHASE ARGUMENT

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[4784] * * * Sympathy should not be the factor this is decided upon, but let's get past just looking at sympathy, ask about your common emotions, that is, those emotions that are reasonably provoked by the evidence, be it to Mr. Boyde's favor or disfavor. We don't want

you to go back into the jury room and be machines. I can assure you I don't want that. I really don't think Mr. Webster wants that either. We don't want you to get back there, say, "Well, I am going to set aside all of my feelings," because feelings are what make you human beings. Feelings are what go into your ordinary routine process of reasoning. * * *

[4785] Secondly, don't play a numbers game. I like the word qualitative. It says a lot. There is such a thing as a quantitative analysis. That is just totaling all things up on one side of the sheet, totaling up the things on another, deciding it on the sheer basis of numbers. A good example of this would be if your side had fifty-five bombs. You have them all totaled up here. The other side had one. [4786] Only it was a hydrogen bomb and yours weren't. Who wins? You have got a qualitative analysis to go through here which means that when you get down to the point of weighing evidence it is not just a question of saying how many crimes did he commit, lining them up as against what good deeds he may have done in life, lining those up then just making some sort of analysis on that.

I am suggesting that you do a qualitative analysis. Now, what do I mean by that? Well, this is a more complicated and complex area than you might think. If you look at it from the standpoint of what causes a man to do what he does, it is not a small matter. It can be a very important matter in determining how you appraise things.

* * * *

[4787] Now, why is this so? Because human beings are complex, human beings are extremely complex.

When you start looking at what is mitigation and what is aggravation, you have to look at the individual who is doing both things; that is, you can't say, "Well, this is aggravating, but it is not mitigating or it is mitigating and it is not aggravating."

* * * *

[4788] All of those factors which go to make a person what he is, and they're not all affirmative and they're all not negative, they're both.

It's like the face, the heads and the tails of the same coin inscriptively together.

So, you can't look at aggravation without looking at mitigation, and you can't look at mitigation without looking at aggravation.

* * *

[4789] So, it isn't a mechanical process. If you treat it that way, you are going to miss the whole thrust of it. To look at somebody, you have to look at them in totality.

Now, I submit that you cannot even begin to weigh aggravation or mitigation until you look at the totality of Richard Boyde.

Now, there's—before I talk about Richard, there's one other thing I wanted to go into. I'm a little bothered sometimes by twenty five cent words.

I don't know if you people know what "extenuate" means or not. I'll be frank to admit that when I first read that section marked "K" with a Defense Lawyer's eye; that is, what does it mean, I frankly didn't have any idea what the word "extenuate" meant. I knew it meant something to whomsoever wrote the statute, but I didn't know.

So, we have agreed upon, and the Judge will instruct you, as to what the meaning of "extenuate" is. And, what you will be instructed by the Judge is that "extenuate" means to lessen the seriousness of a crime as giving an excuse. It is based on that that I will make my argument.

Now, first of all let's look at Richard Boyde without [4790] even getting into the question of what factors in his life are mitigating and what factors are aggravating, let's just look at it.

First of all, let's look at his background.

* * *

[4815] So, all I can say to you is that we ask you, when you get back into that jury room, to look closely at the real Richard Boyde, look at him closely, think about him, appraise him, look at everything he does, has done, and consider carefully what he is doing now.

I believe that if you do that, you will see that he is using you to destroy himself, I ask you not to do that.

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EXCERPT FROM PROSECUTOR'S CLOSING PENALTY PHASE ARGUMENT

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[4817] Secondly, the argument is question of sympathy, sympathy is an interesting thing, because even though you try not to consider it, this decision you are going to be going through has emotional overtones to it. It would be very hard to completely filter out all our emotions, make the decision on a rational basis. Although the instruction says you are to try to do that. When you hear about a person being born in a rural setting where everybody in the family works, coming out to California, not have a father, having, in the language [4818] of the Defense Counsel, being under powered, not knowing who has father is, having a poor childhood, factors like that are things that get people's sympathy, but, you know, every one of those things has a counterpart. * * *

Sympathy is such a shifting sand. It is such a here today, gone today type of idea that it is not the rock upon which we would like you to base your decision on. The—not the Defense attorney nor I do. If you want me to talk about sympathy, we can talk about sympathy for hours. If you [4819] want me to talk about anger, fear, pity, we can talk about this for hours. We could end up with the scale here far more emotionally calling out for the death penalty than we have calling out for life without possibility of parole. But that is not the basis of the decision for anyone. This is not a rush to judgment. This is not a situation where you decide, hey, I don't

like him, I don't like what he does. Make a decision, that is not it. It is those eleven factors that are on the board that have to guide you, direct you, and be the basis upon which you make the decision. You know why that is so important? It is because everyone has a right or the society has a right to expect if you do certain things there is a clear basis for a decision, so that anyone else can be guided by it, also has a right if a person meets factors that each of you will be willing to impose. So, it is predictable.

* * *

[4820] MR. WEBSTER: The Defendant can dance. The Defendant, if he, in fact, did the drawing, may have some artistic talent. The Defendant may, in fact, have been good with children. During the course of twenty-four years, even on a basis of just random luck, you are going to have to have picked up something or done something that is something we [4821] can all approve of, but if you consider that on the weight that goes against it, the people terrorized, the family destroyed, the nephew now facing first degree murder charges, the people he led, he was not merely a follower, he was the leader of the pack. He was the leader at Ramona High School. He was the most outrageous person. If you are going to weigh those two, it is not even close.

* * * At this point the society of which we are all members of and which we need and which we have to look to and we have to rely upon has said in the appropriate case the death penalty is the penalty that should be imposed. And it has given the list of factors to decide it upon. And the point now becomes, and the only question is, should it be or should it not be imposed.

* * *

[4823] Then we have the argument of individual responsibility because that is essentially what the Defense Attorney is saying. He's saying, essentially, that because of his childhood, because of the way he grew up, because

of the failures of institutions, because of the failure of probation officers, parole officers, family, because of things that are beyond his control he is not responsible and that in some fashion should mitigate for this particular crime. That we are [4824] responsible, that he is a victim of society, that he is a victim of his parents, of his mother, that everybody else is responsible but him.

In this entire life he's always blamed someone else for any crime he has ever gotten into. It began back when he was fourteen years old in 1970, it continued in 1974, it continued—I'm sorry, it continued in 1974-1972 when he went to the Youth Authority, 1976, and then finally, even now, when he talked to Callow and even when he testified in court.

No more, no more, you don't sit there and you don't sit there and say, "Hey, man, my childhood was bad, this was bad, that was bad, I am not responsible," no more.

We as a society at some point have a right to expect a person to be responsible for what they do. And, if you go out and commit a crime you are held accountable for it.

If you look and you read what it says about extenuation, it says, "To lessen the seriousness of a crime as by giving an excuse." Nothing I have heard lessens the seriousness of this crime, nothing.

I am not willing to accept responsibility in this case for someone else, I am not willing to hold his mother responsible for it, I am not willing to hold his school responsible for him, I am not willing to hold the Youth Authority responsible for him.

We begin, and the only way we can begin is by him being responsible, otherwise how can you justify punishment at all. I mean, if I am not responsible because I [4825] am just here and I don't have any free will and I am just a product of my society, how you can punish that man because there, for the grace of God, goes every-

one else. We couldn't punish anybody, we couldn't hold anybody responsible. It doesn't work that way.

At some point we have to hope that it is brought home to that person that he is responsible, that he recognizes that his act has a consequence to it and that he has to pay. And, by the God, Richard Boyde has earned, has earned, has gone out of his way to earn this verdict.

I would suggest, as you go through this evidence and you go through each factor, that you go through them one by one and you decide whether that factor aggravates or that factor mitigates.

If you find at the very end that every factor that you've heard aggravates this crime, the penalty is, obviously, apparent, it is clearly the death penalty. But, let's say you find one factor mitigates and the other factors all aggravate. It is not a process of counting, it's not 10 to 1, it is a process of weighing. And, you should decide whether or not that one factor in mitigation outweighs all those factors in aggravation and then decide the case.

And, the instruction is specific on it and I don't know if Defense Counsel is inviting you not to do this, that he is inviting you to make a decision independent of what the instruction is; but, this is what your obligation is, if you conclude the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of [4826] death.

The question of weighing, to me, is the process of using one's brain, rationally evaluating the evidence, totaling it up in your mind and coming to certain conclusions about it. It is a logical process and that's what you're told to do. You are not to throw it out, you are not to decide this case on issues about whether or not you are going to help a person self-destruct or not self-destruct.

This is the last time I'll speak to you, and I don't really have much more to say. I am not going to go through each one of those factors in aggravation, you have all heard this case, you all understand it, you know

it as well as I do. I ask only that as you begin the deliberation process, that you all participate, that you all approach it with the eye of coming and reaching a decision if you can do so. That you listen to everyone else, that you be willing to accept their ideas and that you think in your own mind and be guided by this one thing: The case, which according to law as given in the aggravating and mitigating circumstances, warrants the death penalty. Ask yourselves that.

Might also ask yourselves, "What would I like to have or not have more that would warrant it one way or the other."

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EXCERPT FROM DEFENSE COUNSEL'S CLOSING PENALTY PHASE ARGUMENT

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[4828] But, there is an implication in his rebuttal argument that I do want to deal with it, I want to deal with it very specifically; and, that is, that I am somehow talking outside of those factors.

[4829] I am talking very directly inside of them. If you look at number K again, number K is a very interesting factor. There is a philosophical problem in evidence on a penalty phase. The philosophical problem is, how do you capture, how do you identify all those things that are unique to the individual who is before you? I mean, imagine, if you would, if the drafters of that statute had had to sit down and try to guess at what might be the difference between one person charged with a crime and another and try to outline all of those factors. You can't. You can't do that. So, it is almost a catchall phrase. Any other circumstance, and it means just that, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse. I can get up in front of you, argue until I am blue in the face that I think this factor is mitigation and the District Attorney can get up and argue until he is blue

in the face that this is a factor in aggravation. You have got to identify, you have got to make that choice, you have got to weigh it and you have to appraise it. And I would submit that no matter how mechanical the process may be, it is still a very subjective—a very subjective duty that has been placed on your shoulders. So, what I invited you to do, and I don't want to belabor my whole argument, just want to sum it up. What I invited you to do is look at Richard Boyde in his totality. I didn't mean look at him outside of those factors. I never suggested that, at least I don't believe I did. And say look at him outside the factors. I said look at him in his totality. Then, as you place those factors, consider him as a person, because he is [4830] as responsible for every factor of aggravation as he is responsible for every factor of mitigation. He is the subject matter of this proceeding. And, as you place him and look at what is aggravating, what is mitigating, think about the fact that they are adverse sides of the same coin. Something can be aggravating and mitigating at one and the same time. It goes without saying that if a person has a condition of long standing which causes him to commit crimes, this is an aggravating factor, but it is also a mitigating factor, too. It is up to you to determine what level that may be. And to do that, to do that you have to look at the man, appraise him, study him, think about him. That is why when I had my opening address to you before this penalty phase started, or my side of it started, I told you that I was going to present him to you, not cast in one light or the other, but just the way he is. You met his mother, you met his stepfather, you met his sister, you met his wife, you met his former girlfriend by whom he had a child. You met his surrogate mother, you met all of these people that were significant to his life, that could shed light on him and two psychologists, not one, but two. And it was not all one sided, nor was it intended to be, because in the final analysis it can't be one sided. So, we are not asking

you, we are not asking you to step outside those factors, we are asking you to step inside them fully and completely. Can K outweigh A through J? If you find that it does, it does, and that is your choice. That is what we are asking you to do.

So, I would like to close by asking you to set aside anything that has been said, either by me or by the [4831] District Attorney, more recently it was called a cancer, has been called a lot of things. Let's set all that aside, look at him as a human being. Let's look at him as an individual. Then, as I said before, whatever your judgment is, let it be the best judgment you are capable of. Let it be a full judgment, a complete judgment, a studied judgment, and whatever your decision is, we will abide.

RELEVANT PORTIONS OF COURT'S PENALTY PHASE CHARGE TO THE JURY

The Defendant in this case has been found guilty of murder in the first degree. The charge that the murder was committed under one or more of the special circumstances has been specially found to be true. It is the law of this State that the penalty for a Defendant found guilty of murder of the first degree shall be death or confinement in the State Prison for life without possibility of parole in any case in which the special circumstances charged in this case have been specially found to be true.

Under the law of this State you must now determine which of said penalties shall be imposed upon the Defendant. In determining which penalty is to be imposed on the Defendant you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:

[4832] A, the circumstances of the crime of which the Defendant was convicted in the present proceeding and

the existence of any special circumstances found to be true;

B, the presence or absence of criminal activity by the Defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence;

C, the presence or absence of any prior felony conviction;

D, whether or not the offense was committed while a Defendant was under the influence of extreme mental or emotional disturbance;

E, whether or not the victim was a participant in the Defendant's homicidal conduct or consented to the homicidal act;

F, whether or not the offense was committed under any special circumstances which the Defendant reasonably believed to be moral justification or extenuation for his conduct;

G, whether or not the Defendant acted under extreme duress or under the substantial domination of another person;

H, whether or not at the time of the offense the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication;

I, the age of the Defendant at the time of the crime;

[4833] J, whether or not the Defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor, and,

K, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

The word "extenuate" means to lessen the seriousness of a crime as by giving an excuse. * * *

* * *

[4836] It is now your duty to determine which of the two penalties, death or confinement in the State Prison for life without possibility of parole shall be imposed on the Defendant.

After having heard all of the evidence and having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the State Prison for life without the possibility of parole.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF RIVERSIDE

ABSTRACT OF JUDGMENT

Commitment to State Prison

Dept. No. 1 Case No. CR-18348

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

RICHARD BOYDE

Defendant

Hon. Robert K. Garst

District Attorney by;
E. Webster, Deputy

M. MacMillan, Public Defender

This certifies that on the 20th day of April, 1982, judgment of conviction of the above-named defendant was entered as follows:

- (1) In Case No. CR-18348 Count No. II, V he was convicted by jury, on his plea of not guilty of the crime of Kidnapping during the course of a robbery, Ct. II; Murder in the first degree, Ct. V in violation of Ct. II, 209 Sub(b) PC (12022(b) PC), Ct. V, 187PC with prior felony convictions as follows:

Date	County and State	Crime	Disposition
* 8-26-76	Riverside, Calif.	Robbery	State prison for the term prescribed by law
* 8-26-76	Riverside, Calif.	Robbery	State prison for the term prescribed by law
* 8-26-76	Riverside, Calif.	Kidnapping	State prison for the term prescribed by law

*Charged as 1 prior offense.

Defendant has been held in jail custody for 694 days as a result of the same criminal act or acts for which he has been convicted. local time 463; PC 4019 time 231

Defendant — armed with a deadly weapon at the time of his commission of the offense or a concealed deadly weapon at the time of his arrest within the meaning of Sections 969c and 3024 of the Penal Code. No findings.

Defendant was armed with a deadly weapon at the time of his commission of the offense within the meaning of Sections 969c and 12022 of the Penal Code. Ct. II

Defendant did use a firearm in his commission of the offense within the meaning of Sections 969d and 12022.5 of the Penal Code. Ct. V

- (2) Defendant — adjudged a habitual criminal within the meaning of Subdivision — of Section 644 of the Penal Code; and the defendant — a habitual criminal in accordance with Subdivision (c) of that Section. No findings.
- (3) IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law,

Ct. II consecutively to ct. V.

Ct. V—Death

(4) To the Sheriff of the County of Riverside and to the Director of Corrections at the San Quentin Prison, San Quentin, Calif.

Witness my hand and seal of said court
this 21st day of April, 1982

by /s/ P. Grieshammer P. GRIESHAMMER, Deputy

[illegible]

I do hereby certify the foregoing to be a true and correct abstract of judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

/s/ P. Grieshammer

The Honorable Robert K. Garst

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

SUPREME COURT OF CALIFORNIA

[No. S004447, Crim. No. 22584. Aug. 11, 1988.]

THE PEOPLE,
Plaintiff and Respondent,

v.

RICHARD BOYDE,
Defendant and Appellant.

OPINION

PANELLI, J.—Appellant Richard Boyde was convicted of robbery and kidnapping for robbery and found to have personally used a knife in perpetrating these offenses upon a gas station attendant in Riverside on January 5, 1981. (Pen. Code, §§ 211, 209, subd. (b), 12022, subd. (b).)¹ In addition, Boyde was convicted of robbery, kidnapping for robbery, and first degree murder of the clerk in a 7-Eleven store in Riverside on January 15, 1981. (§§ 211, 209, 189.) The jury found two special circumstances true (murder during the commission of robbery (§ 190.2, subd. (a)(17)(i)) and during the commission of kidnapping in violation of section 209 (§ 190.2, subd. (a)(17)(ii))), found that Boyde personally used a firearm in perpetrating all three offenses (§ 12022.5), and specially found that Boyde “personally killed [the victim with express malice aforethought and premeditation and deliberation.” The jury fixed the penalty at death; the appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

¹ All further statutory references are to the Penal Code unless otherwise indicated.

I. FACTS

A. *The Gas Station Robbery.*

About 2 a.m. on January 5, 1981, the attendant at a Union 76 gas station in Riverside was robbed of \$50 and his watch by a man who had entered the office and displayed two knives. Following the robber's directions, the attendant, Baker, opened the trunk of his car (which was full of miscellaneous items), closed the trunk, turned out the lights, closed up the station, and drove away with the robber in Baker's car. They drove to a park where they smoked a cigarette and talked. The robber said he was out of a job, having just returned from college in the east, and he needed the money to feed his two-month-old baby. He warned Baker not to run away and said he did not plan to use the knives but only had them for self-protection in case Baker tried to “be a hero.” The robber then had Baker drive to a doughnut stand where he bought Baker a doughnut. They began walking down the street together after they could not get the car started. During this walk the robber indicated he expected to get caught and asked Baker to give a false description to police. Baker said he would not, and shortly thereafter the robber abruptly turned and ran away.

Baker gave a description to police and later selected Boyde's picture from a photo lineup. He also identified Boyde at trial.

B. *The 7-Eleven Robbery-homicide.*

About 4 a.m. on January 15, 1981, Riverside police received a report that the 7-Eleven store on Indiana Street was deserted. Investigating officers found a bullet hole in the store window. With the help of the owner it was determined that \$33 had been taken from one of the cash registers and that several hats and hatbands were missing.

Three and one-half hours after the initial report, a local citizen found a body in a nearby orange grove and reported his finding to police at the 7-Eleven store. Investigators found the body, later identified as the store's night clerk Dickie Gibson, lying on its back in the dirt. Detective Callow noticed a gunshot wound in the victim's forehead, a slight wound on the small finger of his right hand, and abrasions on his knees. There were five identifiable footprints at the scene, including an impression left by a flat-soled left shoe near the victim's head and several impressions with a diamond pattern located four feet from the body, near its feet. The autopsy showed the victim was killed by a bullet wound above the right ear, which was probably fired from a .22 caliber gun from a distance of more than 16 inches. There were also gunshot wounds to the fingers of the right hand. The shot to the forehead had not penetrated the skull and was not the cause of death, but the nature of the wound indicated it had been inflicted from close range, probably six to twelve inches. The abrasions on the hands and on the knees could have been caused by a hard dirt or asphalt surface. Death probably occurred between 3 a.m. and 5 a.m. on January 15. The victim's brother testified that everything had appeared normal when he stopped by the store for a visit between 1 and 1:40 a.m.

C. *Appellant's Arrest and Statements to Police.*

Detective Knoffloch, who was investigating the 7-Eleven homicide, showed Boyde's photo to Detective Callow, who was investigating the Baker robbery at the gas station as well as the homicide. After Baker selected Boyde's photo from a photo lineup, Callow obtained a warrant to search Boyde's home. The search recovered a distinctive watch which Baker identified as his. Boyde was placed under arrest on January 22 for the robbery and kidnapping of Baker.

At 8:15 that evening, Callow found Boyde yelling and creating a disturbance in the holding cell. Callow de-

scribed Boyde as "very, very hyper"; his arms were clutched across his chest and he was physically shaking. Boyde told Callow he could not stand being locked up. Callow took him to an interview room and gave him cigarettes and coffee.

After advisement as required by *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974], Boyde waived his rights and agreed to discuss the gas station robbery with Detective Callow. Callow informed Boyde he was under arrest for this robbery and that the watch recovered from Boyde's home had been stolen in it. Boyde denied involvement and claimed he had bought the watch from "Moe." Confronted with information that clothing recovered from his home matched the description of the robber's clothes, Boyde claimed he had loaned the clothes to "Moe." Told that the victim had selected his picture in a photographic lineup, Boyde explained that "Moe" looked quite a bit like him. Finally, confronted with Callow's assertion that police had sufficient evidence to prove he committed the robbery, Boyde said, "you got me."

Boyde then became disturbed at the prospect of returning to prison or jail and asked if there were any way he could avoid it. Callow told him "six or seven times" the police department could not make any such promises. Boyde then asked what would happen if he had information—specifically about the football coach at the 7-Eleven store who was killed. Callow said that he would be willing to relay his information to the district attorney's office.

Boyde then told Callow that he had been at his nephew Carl Franklin's² house between 2:30 and 3 a.m. when his nephew and Big Mike drove up in Big Mike's car. Big Mike got out, holding a paper bag with money in it and

² The codefendant, Boyde's nephew, is named Carl Franklin Ellison. For the sake of clarity we will refer to him as Ellison.

a gun. Eventually, Ellison told Boyde the two men had held up the 7-Eleven store on Indiana Street and had taken the clerk to an orange grove and shot him in the head. Boyde identified Big Mike's gun as a .22 caliber revolver.

Unable to find any Department of Motor Vehicles or police department record of "Carl Franklin" or "Big Mike," Callow asked Boyde if he would be willing to show officers Carl Franklin's house. Boyde agreed and directed the officers to Ellison's house. Boyde was not able to find Big Mike's house.

At 8:30 the next morning Detectives Ropac and Lund, also unable to find any information on "Big Mike" or "Carl Franklin," confronted Boyde with their belief that he had been untruthful with Detective Callow. Boyde agreed to talk further, and a second *Mirandized* interrogation was conducted and tape-recorded. This time Boyde admitted he had been with Ellison from 11 p.m. on January 14 through the time of the homicide. Boyde explained that Ellison had come to Boyde's apartment complex to borrow some gas money from his grandmother. Ellison invited Boyde to go riding with him in his mother's car. The two rode to Ellison's house in Hillside where they drank some beers with guys from the neighborhood, including Big Mike. The group broke up about 11:45, and Big Mike invited Boyde to go riding with him and Ellison. Boyde accepted but asked to be home early. The three drove to San Bernardino, around Riverside and then returned to Ellison's house. There Ellison pulled out a loaded .22 caliber hand gun that belonged to Ellison's mother, Otharean Owens.

The three men drove to the 7-Eleven store at Indiana and Monroe Streets so that Boyde could buy cigarettes and a soda. Both Boyde and Big Mike got out of the car, but Big Mike went into the store alone while Boyde and Ellison waited outside. It was late. The clerk unlocked the door to let Big Mike in, and Big Mike walked to the

back of the store. As Boyde was returning to the car, he looked up in time to see Big Mike pull the gun on the clerk who raised his hands and then put money from the cash register into a bag. Big Mike then brought the clerk outside and told him to get in the back seat of the car. The clerk did not close the door completely, and as Big Mike entered the other rear door, the clerk threw a stereo speaker at him and ran from the car. Big Mike fired once and then chased him. The clerk fell near the side of the store, and Big Mike caught up with him. They returned to the car, and Big Mike told Ellison to drive up Monroe toward the orange groves. Boyde tried to convince Big Mike to let the clerk go, but he refused.

They stopped the car on the pavement near the groves. Big Mike and the clerk walked into the trees. The clerk did not try to escape but asked whether he would be shot. Big Mike said no. Ellison turned the car around. From 25 to 30 feet Boyde could see Big Mike force the clerk to get on his knees facing the trees and place his hands on top of his head. Big Mike stood behind. After Big Mike fired once, the clerk dropped his hands and turned partly around. Big Mike fired a second shot into the back of the clerk's head, and he fell face forward in the dirt. Big Mike rolled the clerk's body over and fired another shot into his head from about a foot away.

The detectives expressed their skepticism at Boyde's ability to describe the robbery in such detail if he had not been inside the store. Finally, Boyde broke down and admitted that he and Ellison had been in the store and there was no one named Big Mike involved. Boyde said he and Ellison had gone out that night for the purpose of committing a robbery because Ellison needed some money. Ellison had trouble selecting a target, and it was about 2:30 a.m. before he finally decided he wanted to rob the 7-Eleven store. They pulled into a nearby driveway, and Boyde took over the wheel. Both men entered the store, but Boyde had gone back outside before Ellison

pulled the gun. They had never discussed kidnapping the clerk, but Ellison brought him out of the store and told him to get in the back seat of the car behind Boyde who was driving. When the clerk ran, it was Ellison who fired the gun and chased him. They drove to the orange grove where Ellison and the clerk got out. Boyde turned the car around and then got out and walked into the grove. Ellison forced the clerk to kneel with his hands on his head. The first shot missed; the clerk brought his hands down and looked at one of them. Then Ellison fired a shot into back of the clerk's head. The clerk fell forward. Boyde asked if he was dead. Ellison did not know and said he thought he better make sure. Ellison put the gun in his pocket, grabbed the clerk's body by the legs and rolled him over so that the body was parallel to a ditch. The clerk was unconscious and making no audible sounds. Ellison shot him again in the head. Boyde drove them back to Ellison's house where Ellison stashed the used shell and the gun in the garage. Ellison took Boyde home.

Boyde described the kind of money taken in the robbery (a few ones, two fives and some change). He said he had worn tennis shoes but didn't remember where that particular pair was. He said Ellison was wearing canvas-topped, rubber-soled walking shoes.

D. Ellison's Arrest and Statements.

Based on Boyde's statement, the officers arrested Ellison and obtained warrants to search his house and car. Officers seized a .22 caliber revolver, two pairs of tennis shoes, and the car stereo speaker Boyde had described. The bullet fragments recovered from the victim could not be positively matched with the gun because of damage to the fragments. The tires of Ellison's mother's car were found to be consistent with tracks at the orange grove, but were not positively matched. One pair of size 13 tennis shoes was consistent with the diamond pattern foot-

prints at the scene but could not be positively matched. The other tennis shoes were dissimilar to impressions at the scene. It was determined that Ellison wore a size 13D shoe and Boyde wore a size 9½C. The flat soled shoe prints near the victim's head were made by a shoe which was in the range of size 7 to size 9.

In an initial interview just after his arrest Ellison told police he had gone to bed at 10 p.m. on January 14 and said he knew nothing about the 7-Eleven robbery. In a second interview several hours later, after police had recovered the gun and some shoes from his house, Ellison continued to maintain his ignorance of the events. Officers then played portions of a tape in which Boyde stated that Ellison had shot the clerk. Ellison finally admitted he was there and said the shooting had happened "just like he [Boyde] said." Ellison then gave a statement which generally paralleled Boyde's description of the incident. It differed, however, in several important details. Ellison said the clerk tried to run away once coming out of the store, a second time from the car and a third time in the orange grove. Ellison placed the clerk alone in the back seat of the car, while Boyde had said Ellison rode in the back with the clerk. Ellison said he had fired two shots, not three, but did not know where the clerk had been wounded. It was dark, and Ellison closed his eyes when firing the first shot. Ellison said he discarded the spent cartridges in the orchard and that Boyde had hidden the gun in Ellison's mother's room. The interviewing officers expressed doubt about the truthfulness of the statement because Ellison did not know enough of the details, but Ellison stuck to it. He agreed to submit to a polygraph the following day.

Ellison stuck to his story during the initial portion of his interview with the polygraph operator, but later recanted. He claimed he did not kill the clerk, but that Boyde did. He said they had gone to the 7-Eleven to "take the money and leave," but Boyde had shot the clerk.

Ellison then gave a detailed account of how the robbery came about. He claimed it was Boyde's idea, that Boyde had asked him to bring the gun and he had done so, that Boyde had driven around and selected the store and then had Ellison drive during the robbery, that Boyde had explained afterwards that he had to kill the clerk because he was determined not to go back to prison. Ellison said he had gone into the grove to see what Boyde was doing and that he had turned the clerk over because Boyde told him to. Ellison was scared; he knew the man was dead. He said he had covered up for Boyde because he felt he bore half the responsibility because he had been present and because he knew Boyde would serve more time as a result of his prior conviction.

II. SUMMARY OF PROCEEDINGS

Boyde, 24, and Ellison, 19, were jointly charged in the robbery, kidnapping and murder of Dickie Gibson, the night clerk at the 7-Eleven store. Only Boyde was alleged to have personally used a firearm in these crimes. (§ 12022.5) Boyde was also charged with the robbery and kidnapping of Baker, the gas station attendant, and three prior convictions were alleged against him. One of the prior offenses was the robbery and kidnaping of the night clerk at the same 7-Eleven store on July 13, 1976.

The trial court heard extensive pretrial motions, including Boyde's motion to sever the counts alleged against him (§ 954), Boyde's motion to exclude evidence of his prior crimes (Evid. Code, § 1101), both defendants' motions to sever their trials (§ 1098), to suppress their incriminating statements to police (for asserted involuntariness and *Miranda* violations) and to exclude portions of those statements implicating the nondeclarant defendant in the Gibson robbery-murder. (*Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476, 88 S.Ct. 1620]; *People v. Aranda* (1965) 63 Cal.2d 518 [47 Cal. Rptr. 353, 407 P.2d 265].)

Codefendant Ellison waived a jury trial several days before the hearing on the motion to sever trials. In light of that development, the court denied the motion to sever trials and granted defendants' motions to exclude each other's extrajudicial statements from their trials. The court also ruled that Boyde's jury could hear Ellison's anticipated defense testimony.

Following lengthy voir dire, the trial proceeded with the prosecution's case-in-chief against Boyde. The prosecutor presented testimony by Baker describing the nature and circumstances of the January 5, 1981, gas station robbery and Baker's in-court identification of Boyde as the perpetrator. The officers who investigated both 1981 crimes testified concerning fruits of the gas station robbery found in Boyde's home, the physical evidence at the 7-Eleven store, the physical evidence at the site where Gibson's body was found and the autopsy results. Boyde's three tape-recorded statements to investigating police officers were played for the jury. Otharean Owens—Ellison's mother and Boyde's sister—testified that during a conversation at the jail, Boyde admitted to her that Ellison was not involved in the killing.

On this state of the evidence the prosecution rested its case-in-chief. Both defendants moved for acquittal. (§§ 1118 and 1118.1.) The court denied both motions.

Boyde's defense consisted only of the testimony of Deputy District Attorney Robert Spitzer, which was offered in support of Boyde's claim that his incriminating statements were involuntary because they were elicited by a promise of lenience. (*People v. Jimenez* (1978) 21 Cal.3d 595 [147 Cal.Rptr. 172, 580 P.2d 672].)

Ellison testified in his own defense before the jury. Unlike his prior statements to police, Ellison's trial testimony placed the blame for the 7-Eleven store robbery and killing entirely on Boyde. Ellison said he had given his mother's revolver to Boyde on the day before the 7-

Eleven robbery, after Boyde asked where he could get a gun. Boyde asked Ellison to help commit a robbery, but Ellison hesitated. On the night of the 14th Ellison went to his grandmother's to borrow gas money. There he picked up Boyde. They drove to Boyde's girlfriend's house in San Bernardino, then returned to Riverside. Boyde asked Ellison to drive to a 7-Eleven store in La Sierra. When they got there Boyde told Ellison to rob the store. Ellison refused and pushed the gun away as Boyde tried to give it to him. As they drove back to Ellison's house, Boyde angrily called Ellison names. Ellison was frightened of Boyde. Some time later—around 2 a.m.—Boyde asked to be driven home and said he wanted to stop for cigarettes. At that time Ellison was aware of the gun lying on the front seat. Ellison, knowing the Indiana Street 7-Eleven would be open, drove there.

Boyde went into the store for cigarettes while Ellison stayed in the car. Ellison saw Boyde draw the gun and rob the clerk. Ellison got scared and started to back the car out of the parking space, but Boyde came to the door and told him to stop. Boyde brought the clerk outside, put him in the rear passenger side seat, and then walked to the driver's side rear door. As he was getting into the other seat, the clerk threw a loose speaker at Boyde and bolted from the car. Boyde fired a shot and chased him. Boyde brought the clerk back to the car at gunpoint. The clerk again got into the rear seat, and Boyde got into the front passenger seat.

Boyde told Ellison to drive. When they reached the orange groves, Boyde told Ellison to stop and turn off the lights. He ordered the clerk out of the car and told Ellison to turn the car around.

Ellison did as he was told, returned to the spot where he had left the others, and went into the grove to find Boyde. He heard a shot. When he found Boyde and the

clerk, the clerk was lying on the ground breathing loudly. Boyde told him to turn the clerk over, but Ellison refused and ran for the car. The car stalled; before Ellison could get it started he heard another shot. Boyde got in, saying, "let's get out of here."

Ellison asked why Boyde had shot the clerk, and Boyde said he would not go back to prison. Boyde told Ellison he had better not talk, that he was just as much at fault, and reminded him that the gun belonged to his mother. Ellison took Boyde home, left the gun with him, and then went home himself.

Ellison stated he did not know Boyde was going to rob the 7-Eleven on Indiana Street, did not know Boyde would kidnap the clerk, did not shoot the gun, and did not touch the clerk's body. As to his feelings about the clerk's death, Ellison testified, "if I could give my life to bring him back, I would do it."

Questioned about his earlier inconsistent statements to police, Ellison testified that he tried to take the blame for Boyde because he was scared of the consequences of his own involvement and because he did not want to see his uncle go back to prison.

On cross-examination Boyde's counsel emphasized Ellison's admission that he had given the gun to Boyde, Ellison's initial willingness to help with a robbery, and Ellison's motive for committing a robbery: Even though Ellison worked steadily for the City of Riverside, he had little or no money left after helping his mother out with the family expenses. Counsel challenged Ellison's claim that he acted out of fear of Boyde and pointed out that Ellison drove the car and selected a store he knew was open at 2 a.m. Counsel questioned Ellison extensively regarding his actions in the orange grove and compared Ellison's account to the photographic evidence showing footprints consistent with Ellison's very near the clerk's feet.

Boyde's counsel and the prosecutor jointly moved to introduce the transcripts and tape recordings of Ellison's extrajudicial statements as prior inconsistent statements (Evid. Code, § 1235), and the tapes were played for the jury.

Ellison's only other defense witness was Lucinda Taylor, his half-sister. Taylor testified that Boyde had come by Ellison's house on January 15 and that he seemed nervous. The two had sat in Ellison's mother's bedroom watching television for a while. Boyde sent her out of the room on contrived errands at least three times.³

In rebuttal of Ellison's evidence, Boyde called his wife Cynthia Boyde, who contradicted Otharean Owens's testimony about Boyde's alleged visiting-room admission of Ellison's innocence. Boyde also called his sister, Helen Kendricks, who corroborated Cynthia Boyde's testimony, and Preston Scott, who testified that Boyde was with him in Whittier for the whole day of January 15 and that he was not at Ellison's house that day.

Finally, Boyde testified in his own defense on rebuttal. Boyde placed primary blame for the robbery and complete responsibility for the killing on Ellison. Boyde testified that Ellison had talked with him about Ellison's frustration with his financial obligation to his mother and his need for more money to meet his personal expenses. Ellison proposed stealing the money he needed, but Boyde warned him of the dangers of doing so, including the possibility that he would be caught and sent to state prison. Nevertheless, on January 14 Ellison made up his mind to commit a robbery, and Boyde agreed to assist him.

Ellison obtained the gun from his mother's room. They met at Ellison's grandmother's and then drove to San Bernardino, back to Riverside and finally to La Sierra

³ The gun was found by police under Otharean Owens's mattress.

where Ellison knew of a possible target store. Once there Ellison realized he might be recognized because he often worked nearby and decided not to go through with the robbery. It was now about 2 a.m. and Boyde asked to be taken home. But Ellison wanted to visit a friend who lived in the apartments near the Indiana Street 7-Eleven. Boyde agreed since he wanted to buy cigarettes. After Ellison finished visiting his friend, he asked Boyde to drive. Boyde drove to the 7-Eleven and waited while Ellison went in for the cigarettes and a soft drink. Boyde started to follow Ellison into the store, but Ellison was already coming out with the clerk in front of him. He tried to put the clerk in the back seat, but the clerk ran. Ellison caught him and managed to get him into the car. He told Boyde to drive to the orange grove where he and the clerk got out and Ellison told Boyde to turn the car around. As he was turning the car, Boyde heard a shot from the grove. He returned to tell Ellison that he had seen another car up the road. When he found Ellison and the clerk in the orange grove, the clerk was lying face down in the dirt. Boyde had by then heard three shots in all. Ellison rolled the clerk over and, to make sure he was dead, fired the final shot into the clerk's forehead. Boyde watched from 10 feet away.

As they drove off, Ellison threw the spent shells out the car window. Ellison didn't want to talk about what had happened. Boyde testified that he had not expected a killing to happen, that he did not intend anyone be killed and that he did not himself shoot the clerk.

Boyde spent the following day with Preston Scott in Whittier; he was not at Ellison's house. He denied ever telling Otharean Owens that Ellison was not involved in the killing.

In spite of photographic evidence showing that the three sets of footprints in the orange grove which related

to the crime were made by the clerk, tennis shoes similar in size and diamond tread pattern to Ellison's, and a pair of flat-soled shoes consistent with Boyde's shoe size, Boyde testified that he had worn tennis shoes with a circular sole pattern on the night of the homicide. He explained that he could not have worn his dress shoes that night because his brother-in-law had borrowed them prior to January 14. But his own witness, Helen Kendricks, testified that her husband borrowed the suit and shoes after Boyde was arrested and that they had never been returned because something happened to them.

The prosecutor went through the details of the three versions of the crime given in Boyde's prior statements. On the stand Boyde admitted he could not see the shooting from the car (as he said in his second version) and claimed, for the first time, that he knew the details of the first two shots only because Ellison had told him exactly what happened. On the stand Boyde said he had lied when he told Detectives Ropac and Lund that he saw Ellison make the victim kneel and fire the first two shots. When questioned about the location of the various footprints—particularly the smaller sized, flat-soled prints near the victim's head—Boyde responded only that neither he nor Ellison had worn such shoes.

The jury found Boyde guilty of all charged offenses and returned a special verdict that Boyde personally committed the homicide with malice, premeditation and deliberation.

The court found Ellison guilty of all counts charged. At sentencing, however, the court found Ellison's lesser culpability as an aider and abettor warranted striking the special circumstances. (*People v. Williams* (1981) 30 Cal.3d 470 [179 Cal.Rptr. 443, 637 P.2d 1029].) Ellison was sentenced to the term prescribed for first degree murder, 25 years to life.

III. CLAIMS OF GUILT PHASE ERROR

A. *Motion to Sever.*

Boyde contends that the trial court's refusal to order separate trials for the defendant constituted a prejudicial abuse of discretion. The California Penal Code provides for joint trials of defendants jointly charged with criminal offenses. "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials. . . ." (§ 1098.) The Legislature has in this manner expressed a preference for joint trials. (See *People v. Lara* (1967) 67 Cal.2d 365, 394 [62 Cal. Rptr. 586, 432 P.2d 202]; *People v. Isenor* (1971) 17 Cal.App.3d 324, 330-331 [94 Cal.Rptr. 746].) The statute nevertheless permits the trial court to order separate trials, and the decision to do so is one "largely within the discretion of the trial court." (*People v. Turner* (1984) 37 Cal.3d 302, 312 [208 Cal.Rptr. 196, 690 P.2d 669]; *People v. Graham* (1969) 71 Cal.2d 303, 330 [78 Cal.Rptr. 217, 455 P.2d 153].) Whether denial of a motion to sever constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion to sever. (*People v. Turner, supra*, 37 Cal.3d at p. 312.)

The grounds which may justify a severance were summarized in *People v. Massie* (1967) 66 Cal.2d 899 [59 Cal.Rptr. 733, 428 P.2d 869]: (1) Where there is an extrajudicial statement made by one defendant which incriminates another defendant and which cannot adequately be edited to excise the portions incriminating the latter; (2) where there may be prejudicial association with codefendants; (3) where there may be likely confusion from evidence on multiple counts; (4) where there may be conflicting defenses; and (5) where there is a possibility that in a separate trial the codefendant may give exonerating testimony. (*People v. Massie, supra*, 66 Cal.2d at pp. 916-917.)

In arguing the motion, Boyde's counsel conceded that there was no longer an *Aranda* problem (*supra*, 63 Cal. 2d 518) after Ellison's waiver of a jury trial. Counsel nevertheless argued strenuously in favor of severance on the ground of inconsistent defenses. Counsel's principal concern was about the prejudice that would result from Boyde's jury hearing Ellison's testimony. Counsel noted that the defendants' defenses were inconsistent and mutually antagonistic in that each attempted to place primary responsibility on the other for the robbery and murder.

Although several California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, none has found an abuse of discretion or reversed a conviction on this basis. (See *People v. Massie*, *supra*, 66 Cal.2d 899; *People v. Turner*, *supra*, 37 Cal.3d 302; *People v. Jones* (1970) 10 Cal.App. 3d 237 [88 Cal.Rptr. 871]; *People v. Wheeler* (1973) 32 Cal.App.3d 455 [108 Cal.Rptr. 26].) Indeed, we recently rejected such a claim in *People v. Turner*, *supra*, 37 Cal.3d at pages 311-313, where Turner presented no defense and his codefendant Souza testified that Turner was the killer and that he had assisted in the robbery because he feared Turner. We noted that there is a statutory preference for joint trials (see § 1098) and that the "instant case provided the classic situation for joint trial—defendants charged with common crimes against common victims. [¶] As to conflicting defenses, counsel could articulate no reason for separate trials except to point out that the prosecution would simply put on its case, then sit back and watch as defense counsel became the real adversaries. Of course, if that point has merit, separate trials would appear to be mandatory in almost every case." (37 Cal.3d at pp. 312-313.)

On the basis of the showing made in *Turner* at the time of the motion—two defendants charged with murders under circumstances in which they were jointly in-

volved and might be expected to attempt to cast primary blame on the other—we concluded that the trial court had not abused its discretion in denying separate trials. We noted, however, that such a ruling could still be the basis for reversal after trial if the reviewing court determined that, "because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law. . . . [However,] no denial of a fair trial results from the mere fact that two defendants who are jointly tried have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution." (*Id.* at p. 313.)

The Ninth Circuit Court of Appeals refused to find an abuse of discretion in similar circumstances. In *United States v. Brady* (9th Cir. 1978) 579 F.2d 1121 (cert. den. 439 U.S. 1074 [59 L.Ed.2d 41, 99 S.Ct. 849]), each of the two defendants facing manslaughter charges defended by claiming that the other inflicted the fatal blows to the victim of their joint assault. Acknowledging the obvious hostility and conflict in the positions taken by defendants, the court found that "the prejudice which either appellant may have suffered from the testimony of the other is relatively slight. It is undisputed that each appellant participated in the incident. Consequently, it would only be natural for one to try to place the blame on the other. The jury had the responsibility of assessing each of the appellants' credibility. Moreover, the testimony of each appellant was merely cumulative of the government's case against the other and considering the simplicity of the case, there is no sound reason to suggest that members of the jury, being properly instructed as they were, could not realistically appraise the evidence against each appellant." (*Id.* at p. 1128.)

As in *Turner*, *supra*, 37 Cal.3d 302, and *Brady*, *supra*, 579 F.2d 1121, it cannot be said here that the trial court abused its discretion in denying severance or that Boyde

was denied a fair trial by the procedure employed. Although the defense positions might be characterized as antagonistic on the issue of the identity of the actual killer, it was undisputed that each defendant participated in the incident. Ellison's testimony—while critical as a percipient witness in placing the gun in Boyde's hand—only corroborated the other details of the offense established by Boyde's own extrajudicial statements and physical evidence presented by the prosecution. Ellison did not present the kind of extensive evidence against Boyde which would have turned the trial into more of a contest between the defendants than between the prosecution and either of them, and his counsel made no arguments to the Boyde jury. No evidence inadmissible as to Boyde was introduced as a result of the joint trial; Boyde himself introduced Ellison's extrajudicial statements, and Ellison was available and fully cross-examined. (See *Nelson v. O'Neil* (1971) 402 U.S. 622 [29 L.Ed.2d 222, 91 S.Ct. 1723].) The prosecutor did not simply sit back and let the defendants convict each other; his case-in-chief against both successfully withstood the test of sections 1118 and 1118.1, and he aggressively cross-examined Ellison as well as Boyde.

Boyde's assertions of unfair prejudice are likewise unpersuasive. He claims that Ellison's status as a defendant-witness permitted the prosecutor to benefit from Ellison's accusation against Boyde while being relieved of the responsibility of informing the jury that the testimony contained perjury. But since the prosecutor did not present Ellison's testimony, he did not impliedly vouch for its credibility. Boyde's claim that Ellison's status as codefendant prevented discovery of a secret deal between Ellison and the prosecution must fail because of the lack of any factual support in the record that such a deal in fact was made. Boyde cannot complain that he was unfairly prejudiced by his testimony, when his case was damaged by his own lack of credibility as a witness.

Although Boyde may have been surprised by Lucinda Taylor's testimony that he had an opportunity to return the gun to Ellison's mother's room, he did rebut it with testimony from Preston Scott that both were in Whittier at that time. Similarly, though Boyde may have been surprised by Otharean Owens's testimony—elicited on cross-examination by Ellison's counsel—that Boyde had admitted guilt, he was able to rebut this testimony with his own witnesses who denied that he made an affirmative reply to Ms. Owens. And although the prosecutor's remarks at Ellison's sentencing hearing acknowledge the importance of Ellison's testimony in establishing Boyde as the actual killer, there was nothing improper about this testimony at a joint trial.

B. *Alleged "Secret Deal" Between Ellison and Prosecutor.*

Boyde claims the prosecutor's failure to disclose an inducement given for Ellison's testimony constituted the suppression of substantial material evidence relating to the credibility of a key witness which denied him due process of law. (*People v. Ruthford* (1975) 14 Cal.3d 399, 406 [121 Cal.Rptr. 261, 534 P.2d 1341, A.L.R.4th 3132]; see also, *People v. Phillips* (1985) 41 Cal.3d 29, 45-49 [222 Cal.Rptr. 127, 711 P.2d 423].) Although Ellison was not called as a witness for the prosecution, and although no plea bargain was entered, Boyde asserts that Ellison's decision to waive jury and submit to a court trial and his decision to testify in his own defense were prompted by an express or implied agreement that the prosecutor would not seek the death penalty against Ellison, and would agree that any special circumstances found true as to Ellison should be stricken.

In *People v. Ruthford* we held that the duty on the part of the prosecution to disclose all substantial material evidence favorable to an accused extends to disclosure of evidence which relates to the credibility of a material

witness and that the suppression of substantial material evidence bearing on the credibility of a key prosecution witness constitutes a denial of due process within the meaning of the Fourteenth Amendment to the United States Constitution. (14 Cal.3d at pp. 406, 408.)

To demonstrate the existence of a "secret deal" between the prosecutor and Ellison, Boyde quotes from the statements of counsel and the district attorney made at the time of the jury waiver and later at Ellison's sentencing hearing.

On October 6, 1981, while hearing another motion pertaining only to Ellison, counsel announced that Ellison had elected to waive jury trial. The prosecutor joined in the waiver as to trial on guilt, special circumstances, and penalty. The prosecutor stated on the record "this is not a slow plea by any stretch of the imagination, and there are no concessions being made by either side, and it will be anticipated a fully contested trial down the line on the issue of guilt." The prosecutor also stated, "As the Court well knows, and since there will not be picking a jury, there will be no evidence presented in aggravation other than the facts of the crime and the special circumstances. [¶] While I—I'm not going to come out in court and concede something at this point in time—it suggests to me that at some point in time the law is going to require the Court—will not put the Court in a position to come back with a finding of death in this case. [¶] We would not be willing to waive jury to put you in that kind of a predicament in a case like this. [¶] I think it is not part of the negotiations for the jury waiver, or anything else. It is just an understanding that there will be no further evidence in aggravation, and that as I interpret the factors under 209 [sic] of the Penal Code, the Court will be required as a matter of law, to come back if, in fact, special circumstances are found, of course, with life without parole, and I wanted the Court to be aware of that." Ellison's counsel then

commented that "Mr. Ellison will take part in the regular full-blown trial. There's been no concessions made by the District Attorney. In fact, it was after a little agonizing soul searching and conferences that my proposal to waive jury was accepted by him, and then I had to reconsider all the facets. [¶] We will take part in the trial. Evidence will be presented and Mr. Ellison will testify."

The court, in taking Ellison's waiver of constitutional rights, informed Ellison that under the court's prior rulings the special circumstances would be applicable even if he had not actively participated in the murder and that he therefore faced a potential sentence to prison for life without possibility of parole.

Boyde also points to statements made by Ellison's counsel in closing argument to the court: "This was a pretty unique case to me. I've defended a lot of them but never assisted in the prosecution of one and during this trial, I did have the opportunity to cross-examine Mr. Boyde and this sort of thing. [¶] Without Mr. Ellison, I think possibly Mr. Ellison's cooperation and assistance, I think possibly it would have been very difficult—maybe not impossible, but it would have been difficult to have a verdict of guilty come in on Mr. Boyde. [¶] But all those things aside, there was no plea bargain struck. Plea bargains are not struck in cases such as this. There was no plea bargain and no assurances made."

At the sentencing hearing on June 21, 1982, Ellison's counsel reiterated: "Mr. Ellison cooperated after he finally realized his uncle, Richard Boyde, the codefendant, was taking him down with intent. Mr. Ellison has been helpful. I believe that it would have been a great—there would have been a great deal of difficulty, not impossibility, but difficulty in convicting Mr. Boyde without Mr. Ellison's assistance. [¶] Mr. Ellison's testimony, I believe, was the turning point in making Mr. Boyde come

forth and begin to show his true colors." Ellison's counsel thereupon urged the court to strike the special circumstances and the prosecutor agreed, stating: "In large part, I think Richard Boyde—the conviction of Richard Boyde—resulted probably, even perhaps unintentionally from the posture Mr. Ellison and his attorney took in this case. Had Mr. Ellison not waived jury and obviously streamlined the entire proceeding, the case could have been severed.

"I don't think the Boyde jury would have then heard Ellison's statements made to the police officers on tape. They would not have been able to compare Ellison's statements with Boyde's statements. They would not have had Boyde's testimony. . . . And once they got to see what Mr. Boyde was really all about, and they got to hear the respective knowledge about the facts of the case, that each of the two defendants had, it became clear that Mr. Boyde was the killer and more culpable.

"So Mr. Ellison has, perhaps not intentionally done a tremendous service to the People of the State of California by his posture in this particular case." The prosecutor also argued that Ellison was less culpable for the murder and concluded, "I believe that if this defendant is sentenced to a 25 to life sentence, rather than a Life Without Parole, justice will have been served, or at least not disserved."

The weakness of Boyde's argument lies in the fact that the record contains no direct evidence or admission of the existence of an agreement, but does contain express denials. While the facts recited by appellant would be consistent with the existence of an agreement, both the district attorney and defense counsel stated that no agreement had been made. The court never inquired on the record into the nature and extent of the discussions between Ellison and the district attorney leading to the mutual waiver of jury trial on guilt, special circumstances and penalty. Although Boyde's counsel was ab-

sent when the waiver was made, he did not raise the question on any other occasion and never suggested there had been a "secret deal." The district attorney's position regarding the appropriate sentence for Ellison remained consistent throughout the prosecution: he charged only Boyde with personal use of a firearm and had apparently determined that Boyde was the leader and actual killer.

The fact that Ellison later successfully moved to have his conviction reduced to second degree murder, pursuant to *People v. Dillon* (1983) 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 697], and that the district attorney at that time agreed the reduction would be appropriate, is not determinative either. The district attorney's position as to the relative culpability of the codefendants remained consistent.

On this record, we cannot conclude that there was an agreement between Ellison and the prosecutor which was not disclosed to Boyde.

C. Voluntariness of Boyde's Statements.

Boyde challenges the admission of his various statements to the police, claiming they were not proved beyond a reasonable doubt to have been voluntarily given. (*People v. Jimenez, supra*, 21 Cal.3d 595.) Specifically, he argues that: (1) the January 22 statement in which he admitted knowledge of the 7-Eleven robbery-homicide was induced by an implied promise of leniency with regard to the charges arising out of the gas station robbery-kidnapping (*People v. Jimenez, supra*, 21 Cal.3d at pp. 611-612); (2) he did not waive his rights with regard to the offense of murder (see *U.S. v. McCrary* (5th Cir. 1981) 643 F.2d 323, 328); (3) the statement was given while he was in a state of extreme emotional upset and was not therefore the "product of a rational intellect and a free will" (*People v. MacPherson* (1970) 2 Cal.3d 109, 113 [84 Cal.Rptr. 129, 465 P.2d 17]; *In re Cameron* (1968) 68 Cal.2d 487, 498 [67 Cal.

Rptr. 529, 439 P.2d 633]; (4) the January 23 statements in which he admitted involvement in the robbery-homicide were the fruits of the earlier, involuntary statement (*People v. Braeseke* (1979) 25 Cal.3d 691, 703-704 [159 Cal.Rptr. 684, 602 P.2d 384]); and (5) the final statement on January 23, in which he confessed the 7-Eleven robbery was induced by police deception as to the legal consequences of his prior admission of some involvement (see *People v. Disbrow* (1976) 16 Cal.3d 101, 112, fn. 12 [127 Cal.Rptr. 360, 545 P.2d 272].)

"It is axiomatic that the use in a criminal prosecution of an involuntary confession constitutes a denial of due process of law under both the federal and state Constitutions. [Citations.] In California, before a confession can be used against a defendant, the prosecution has the burden of proving that this was voluntary and was not the result of any form of compulsion or promise or reward. [Citations.]" (*People v. Jimenez, supra*, 21 Cal.3d at p. 602.) The prosecution bears the burden of proof, and the proof must establish voluntariness beyond a reasonable doubt. (*Id.* at p. 608.) At the trial level, the determination is made by the trial court outside the presence of the jury. (*People v. Jimenez, supra*, at p. 604.) The appellate court must examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was properly found. With respect to conflicting testimony, the appellate court accepts that version of the facts most favorable to the finding below, to the extent it is supported by the record. *Id.* at p. 609.) Here the trial court found beyond a reasonable doubt all statements were voluntary.

1. Implied Promise of Leniency on Gas Station Charges.

In general, a confession is considered voluntary "if the accused's decision to speak is entirely 'self-motivated' [citation], i.e., if he freely and voluntarily chooses to

speak without 'any form of compulsion or promise of reward. . . .' [Citation.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 327-328 [165 Cal.Rptr. 289, 611 P.2d 883].) However, where a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law. (*People v. Brommel* (1961) 56 Cal.2d 629, 632 [15 Cal.Rptr. 909, 364 P.2d 845].) Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise, does not, however, make a subsequent confession involuntary. (*People v. Jimenez, supra*, 21 Cal.3d at p. 611.)

Boyde claims that his initial statement admitting knowledge of the Gibson robbery-homicide was induced by an implied promise that a statement would lead to more favorable disposition of the charges of robbery and kidnapping for robbery of Baker, for which he had been arrested. Because Detective Callow admitted that he considered appellant a potential suspect in the Gibson homicide at the time of the January 22 interview regarding the Baker robbery-kidnapping, Boyde asserts the officer was motivated by a desire to obtain an incriminatory statement. Further, although Callow repeatedly informed Boyde that the police could not promise leniency but could only pass any information along to the district attorney who had the authority to make such an offer, Boyde argues Callow "made it crystal clear" that he had "no hope of anything other than incarceration" unless he gave a statement on the homicide. (See *In re Roger G.* (1975) 53 Cal.App.3d 198 [125 Cal.Rptr. 625].)

The argument is unpersuasive. The evidence shows that there was no promise of leniency, no attempt to induce a confession, and no confession. Appellant initiated discussion of the homicide because of his own hopes of obtaining leniency on the robbery-kidnapping

charges. The statement he gave was neither a confession nor an admission, but an attempt to lay blame for the crime on "Big Mike" and Ellison. Detective Callow's role in eliciting the story was responsive rather than aggressive, and he repeatedly and clearly stated that he had no authority to make any promise of leniency regarding the pending robbery-kidnap charges, but could only pass information on to the district attorney.

The cases upon which Boyde relies are inapposite. In *In re Roger G.*, *supra*, 53 Cal.App.3d 198, for instance, officers engaged in a lengthy effort to induce a minor to abandon his claim of innocence of a shooting for which he had been arrested. They told him he might be incarcerated for "'seven or eight or ten or life, you know . . .'" and said, "' . . . it's gonna help you out for a chance of probation or getting parole if you are honest about the thing. . . . [but] if you go in there . . . and . . . try to cover up, do you think we'd give you a chance at probation or parole? No way.'" Although they subsequently stated they could not promise probation or parole, that it was only a possibility, the appellate court found the evidence established an "implied, if not express threat of harsher punishment if Roger did not confess, and an implied, if not express, promise of the possibility of more lenient treatment if he did." (*Id.* at pp. 200-202.) And although dictum in *People v. Nelson* (1964) 224 Cal.App.2d 238 [36 Cal.Rptr. 385] indicates that a confession to crimes for which defendant was arrested might be involuntary if induced by promises of lenient treatment on an unrelated pending charge, that is not the factual posture of appellant's case.

At the time of his January 22 statement Boyde made a voluntary, if unwise, decision to offer false information in hope of obtaining favorable treatment. The trial court's determination that the statement was voluntary beyond a reasonable doubt is correct.

2. Failure to Inform Appellant He was Suspected of Murder.

Boyde argues that the failure to inform him he was a suspect in the robbery-murder rendered his January 22 statement involuntary because his decision to waive his rights to remain silent and to consult counsel was not made knowingly, intelligently and voluntarily. He acknowledges that no California decision had held that *Miranda* warnings (*Miranda v. Arizona*, *supra*, 384 U.S. 436) must specify the actual charge pending against the person being interrogated and that the Court of Appeal rejected such an argument in *People v. Neely* (1979) 95 Cal.App.3d 1011, 1017 [157 Cal.Rptr. 531]. He also acknowledges that the Court of Appeal has held that new *Miranda* warnings are not necessarily required whenever an interrogation about one crime leads to discussion of another. (*People v. Schenk* (1972) 24 Cal.App.3d 233, 236 [101 Cal.Rptr. 75].)

He urges that the position taken by a minority of courts which require such information to implement *Miranda* is the better approach. Boyde relies upon *United States v. McCrary*, *supra*, 643 F.2d 323, *Schenk v. Ellsworth* (D.C.Mont. 1968) 293 F.Supp. 26, and *Commonwealth v. Dixon* (1977) 475 Pa. 17 [379 A.2d 553]. The argument does not fit the facts of this case. On January 22 Boyde volunteered information about these crimes, and as noted above, admitted no complicity but claimed to know that others had committed the offenses. This statement was damaging because it led directly to the later statements in which Boyde admitted his guilt, but was incriminating only by comparison to those later statements.

3. Boyde's Capacity to Make a Knowing and Voluntary Waiver.

Boyde asserts that his January 22 statement was taken within minutes after he was removed from the holding

cell "because he was completely unnerved by an apparent attack of caustrophobia, and in terror of being incarcerated in the Riverside County Jail." He cites Detective Callow's description of his "very hyper, very nervous condition" to show that his decision to give a statement was not "'the product of a rational intellect and a free will.'" (People v. MacPherson, supra, 2 Cal.3d at p. 113; In re Cameron, supra, 68 Cal.2d at p. 498.)

The evidence does not indicate Boyde was so distraught that his will to resist confession was overborne. Detective Callow testified that Boyde seemed to calm down after being removed to an interview room and being given coffee and a cigarette. Boyde presented no contradictory evidence. There was no indication of intoxication or mental illness.

4. *The January 23 Statements as Fruit of the January 22 Statement.*

This argument falls with the conclusion that the January 22 statement was voluntarily given.

5. *January 23 Confession Induced by Misrepresentation of Detectives Lund and Ropac.*

When Detectives Lund and Ropac approached Boyde on January 23 they first told him they thought the story he told Callow was not truthful. They asked if he was willing to talk with them again about the robbery-homicide and when he indicated he would, took a full *Miranda* waiver. Boyde then told his second story. He admitted he had been with Ellison and Big Mike at the 7-Eleven, that Big Mike had pulled the robbery and that he (Boyde) had driven the car from the store to the orange grove. But he claimed he did so under protest, denied assisting in the killing and denied any advance knowledge of Big Mike's intent to rob or kill.

Boyde claims that at the conclusion of this statement Lund told him it amounted to a full confession, that he believed Boyde had in fact been more deeply involved than he had admitted, and that any further statement could not result in any greater liability than he had already incurred. After this confrontation Boyde told his final version, which implicated him at least as an accomplice in the robbery and felony murder. Boyde contends this incriminating statement was induced by Lund's misrepresentation as to the legal effect of the prior statement, and that this deception amounts to psychological coercion which rendered the statement involuntary. (See *People v. Hogan* (1982) 31 Cal.3d 815, 840-841 [183 Cal. Rptr. 817, 647 P.2d 93].)

Boyde's description of the encounter is factually inaccurate. The transcript of the interview shows that at the conclusion of the "I was just along for the ride" story, Lund stated: "I'll tell you the problems I'm having, and, and I'm no lawyer, but I would think . . . what bothers me is you, you got such great detail, you sure you weren't in the store? You sure you didn't walk in?" Boyde repeated he had not gone in. Lund continued questioning whether Boyde might have been in the doorway of the store and whether he could have seen the money go into the bag or heard Big Mike saying it was a robbery without having been in the store. Finally, Lund stated: "It doesn't make no difference whether you were sitting in the car the whole time or whether you were right in Big Mike's back pocket, you're, you're involved in this the same, if everything else is the truth. . . ."

While Lund made it clear he believed appellant was more deeply involved in the crimes than he was admitting, he did not tell Boyde that his prior statement amounted to a confession or that any further statement could not result in any greater liability. Lund's statements amounted to harsh questioning, but did not rise to

the level of psychological coercion or misrepresentation of the legal consequences of appellant's prior statement.

D. Admission of Prior Conviction.

The prosecutor offered evidence of the circumstances of appellant's 1976 robbery and kidnapping of Lou Creech pursuant to Evidence Code section 1101, subdivision (b) to show appellant's identity as the perpetrator of the Baker offenses, to show his identity as the dominant figure in the Gibson robbery-murder, to show that appellant participated in the Gibson offenses with the intent to commit robbery and kidnapping for robbery, and to show that appellant had a motive for killing Gibson. The trial court found that the prior and charged offenses shared a sufficient number of distinctive common marks to establish a unique *modus operandi*, that the evidence of *modus operandi* was relevant to the material issue of appellant's identity as the perpetrator of the Baker robbery-kidnapping, and that the evidence was relevant to show Boyde's intent, if he was found to be an aider and abettor in the Gibson incident, or, alternatively, to show that he was the leader in perpetration of that crime.

Boyde contends the 1976 and 1981 7-Eleven offenses lacked sufficient common, distinctive marks to establish a *modus operandi*, that the evidence was merely cumulative on the question of the identity of the participants in the Gibson offenses, that the evidence had no significant probative value regarding the identity of the actual killer of Gibson, and that the trial court failed to properly weigh the prejudicial effect of the prior crimes evidence against its probative value pursuant to Evidence Code section 352.

We need not determine the merits of this contention since it is clear that any error in admitting the evidence was harmless. There is no reasonable probability that Boyde would have obtained a more favorable result had the evidence been excluded. (*People v. Watson* (1956) 46

Cal.2d 818, 836 [299 P.2d 243].) Boyde's defense was damaged beyond repair, even without consideration of the prior crime, by Ellison's testimony, inferences from the placement of the footprints in the orange grove, and Boyde's extensive knowledge of the details of the robbery and shooting.

E. Erroneous Jury Instruction.

Boyde claims the trial court erred in giving CALJIC No. 2.27—which permits proof of any fact by the testimony of a single witness⁴ in this case where critical evidence on a central issue came from an accomplice whose testimony is required by law to be corroborated (§ 1111; CALJIC Nos. 3.11, 3.18). Although the court also instructed on the principles that an accomplice's testimony should be viewed with caution (CALJIC No. 3.18), that a defendant cannot be convicted on the testimony of an accomplice unless that testimony is corroborated (CALJIC No. 3.11), and that if anyone committed the robbery, kidnapping and murder Ellison was an accomplice as a matter of law, Boyde claims No. 2.27 effectively nullified these instructions.

This claim is unpersuasive. Although Boyde is correct that use of No. 2.27 is discouraged in cases where one witness's testimony requires corroboration (see use note to CALJIC No. 2.27 (4th ed. 1979)), so long as the appropriate instructions on the use of accomplice testimony are given, the giving of No. 2.27 is not error. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 333 [190 Cal.Rptr. 211]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 974-975 [193 Cal.Rptr. 799].)

⁴ CALJIC No. 2.27 provides: "Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact [required to be established by the prosecution] to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends."

F. *Carlos Error.*

Boyde contends that the court prejudicially erred under *Carlos v. Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], in failing to instruct the jury that it could not find the felony-murder special circumstances true unless it found that defendant intended to kill at the time of the homicide. His contention must be rejected.

In *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], we held that, with respect to the actual killer, the court need not instruct on intent to kill in connection with felony-murder special circumstances. Such an instruction is required only when there is evidence from which the jury could find that the defendant was an accomplice rather than the actual killer. Although an instruction was warranted on the basis of Boyde's testimony that he was not the killer, the error in failing to give it was cured by the jury's special verdict that Boyde "personally killed Dickie Lee Gibson with express malice aforethought and premeditation and deliberation."

Boyde nevertheless argues that he should not be bound by this finding because he did not have reasonable advance notice that the special verdict would be presented to the jury. We do not agree. Boyde argued throughout pretrial proceedings that it would be unconstitutional to impose the death penalty in the absence of proof that he actually killed or intended that a killing occur. He addressed the issue in his defense testimony by denying any knowledge or intent that a killing would occur. Thus he was neither unfairly surprised nor denied an opportunity to present all the evidence at his command on the issue of intent. The trial court instructed the jury on premeditated and deliberate murder and malice aforethought, as well as felony murder; all of the elements of the special verdict were explained to the jury.

IV. JURY SELECTION ISSUES

A. *Challenge to Death-qualification of Guilt Phase Jury.*

Boyde claims that removal from the guilt phase jury of 11 persons who would automatically vote against death at the penalty phase but who could render an impartial verdict on the issue of guilt or innocence violates the constitutional requirement that his jury be drawn from a fair cross-section of the community and his constitutional right to trial by an impartial jury. These claims have been rejected by both this court and the United States Supreme Court. (*Lockhart v. McCree* (1986) 476 U.S. 162 [90 L.Ed.2d 137, 106 S.Ct. 1758]; *People v. Fields* (1983) 35 Cal.3d 329, 374 [197 Cal.Rptr. 803, 673 P.2d 680] (Kaus, J., conc.); *Hovey v. Superior Court* (1980) 28 Cal.3d 1 [168 Cal.Rptr. 128, 616 P.2d 1301].)

B. *Use of Peremptory Challenges to Exclude Persons With Reservations About the Death Penalty.*

Boyde argues that the prosecutor's use of peremptory challenges on all prospective jurors with reservations about the death penalty denied him an impartial jury on the issue of penalty and constituted group bias in violation of *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748]. We have previously rejected this argument in *People v. Zimmerman* (1984) 36 Cal.3d 154, 160-161 [202 Cal.Rptr. 826, 680 P.2d 776] and *People v. Turner, supra*, 37 Cal.3d at pages 313-315.

C. *Witherspoon Error.*

Boyde contends that three jurors were improperly excused under *Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770]. He asserts that the jurors had not made it "unmistakably clear" that they "would automatically vote against the imposition of capital punishment without regard to the evidence that might be developed at the trial . . ." (*Id.* at p. 522, fn. 21).

[20 L.Ed.2d at p. 785].) The United States Supreme Court recently modified the *Witherspoon* standard in *Wainwright v. Witt* (1985) 469 U.S. 412 [83 L.Ed.2d 841, 105 S.Ct. 844], and we adopted that modification in *People v. Ghent* (1987) 43 Cal.3d 739, 767-769 [239 Cal.Rptr. 82, 739 P.2d 1250]. (18) The new standard is whether a juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (469 U.S. at p. 424 [83 L.Ed.2d at pp. 851-852].) "[I]n addition to dispensing with *Witherspoon*'s reference to 'automatic' decisionmaking, this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." (*Ibid.* [83 L.Ed.2d at p. 852].) Our task on review is to examine the context surrounding the juror's exclusion to determine whether the trial court's decision that the juror's beliefs would "substantially impair the performance of his duties as a juror" is fairly supported by the record. (*Darden v. Wainwright* (1986) 477 U.S. 168, — [91 L.Ed.2d 144, 153-154, 106 S.Ct. 2464, 2469].)

1. Prospective Juror Warren.

Although prospective juror Warren gave some seemingly equivocal answers earlier, his final answer was quite clear. The court asked Warren whether he could "under any circumstances return a verdict that would result in the death penalty for Mr. Boyde or anyone." Warren responded, "I can't do it, sir." He was then excused for cause. His excusal was proper under either the *Witt* or *Witherspoon* standard.

2. Prospective Juror Bennett.

Prospective juror Bennett was initially unclear as to whether he was unequivocally opposed to the death penalty. His later responses, however, revealed his clear op-

position to the death penalty. In reply to questions from both defense counsel and the prosecution about whether he would impose the death penalty if he found that the evidence in aggravation outweighed the evidence in mitigation, he stated that he would not, regardless of the severity of the evidence in aggravation. Prospective juror Bennett also said he could think of no circumstance where he could personally vote for the death penalty. He was thereafter excused. The record supports the trial court's excusal in that it demonstrates that prospective juror Bennett's views would "substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424 [83 L.Ed.2d at pp. 851-852].)

3. Prospective Juror Warne.

Prospective juror Warne testified to having "mixed feelings" about the death penalty, and stated, "I don't know that taking a life is a proper form of punishment." When asked whether she personally could return a verdict that would result in the death penalty, she responded, "No, I don't think so." She stated that the way she felt "right now" was that she would not under any circumstances return a death verdict. She further stated that her ideas might change, that she had no way of knowing if they would, but that she was not convinced that taking another life "is the way to go."

Defense counsel then sought to explain the balancing of aggravating factors against mitigating factors, but gave an explanation later determined to be inaccurate in *People v. Brown* (1985) 40 Cal.3d 512 [220 Cal.Rptr. 637, 709 P.2d 440] (rev'd. on other grounds, *California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]). Counsel stated that if a juror weighed the evidence and determined that the evidence in aggravation outweighed the evidence in mitigation, "the law mandates that you come in with a finding of death, no matter what your personal feelings may be." Under those circum-

stances he asked if she could impose a death penalty, and Ms. Warne replied, "No, I don't think I could."

In response to the district attorney, Ms. Warne stated that she could perhaps conceive of voting for death if a crime were committed against one of her children, but could think of no other situation. Finally, the district attorney reiterated that the law requires a death verdict where aggravation outweighs mitigation, "even if you personally don't think the crime is worth it. . ." and asked whether she would be able to follow her oath as a juror and return the verdict. She replied that she could not: "No, couldn't do it. I would have to disobey."

Prospective juror Warne's responses indicated that she would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522, fn. 21 [20 L.Ed.2d at p. 785].) The only situation in which she would be willing to vote for the death penalty was one which she would never encounter, since she would never be permitted to be a juror in a case involving a crime against her child. The fact that defense counsel and the prosecutor may have misstated the decisionmaking process under *People v. Brown*, *supra*, 40 Cal.3d 512, does not alter our conclusion. The question at hand was whether prospective juror Warne would be willing to follow the law and vote to impose the death penalty in an appropriate case. She indicated that she would not, and that qualified her for excusal under *Wainwright v. Witt*, *supra*, 469 U.S. 412.

V. PENALTY PHASE ERROR

A. Facts.

1. Prosecution Evidence.

As evidence in aggravation, the prosecutor presented testimony by victims of past offenses committed by defendant, testimony by Boyde's California Youth Author-

ity (CYA) parole officer as to his conduct while on parole, and evidence of Boyde's plan to escape from jail during the trial of the instant charges.

Katherine Hagen testified that Boyde robbed her on June 26, 1976, while she was working at the Circle K Market in Riverside. Mark Page testified that he was robbed by Boyde on July 15, 1976, while he was working at a 7-Eleven store on Pine Street in Riverside. Tim Hanks testified that Boyde robbed him on July 16, 1976, while he was working at a 7-Eleven store on Wells Street in Riverside. Charles Skalf testified that he was robbed by Boyde on July 19, 1976, at a Winchell's Donut store. Edward Wall testified that Boyde robbed him on July 19, 1976, at a 7-Eleven store on Van Buren Street in Riverside.

Colleen Dietzman and Karen Smith testified that Boyde participated in an assault on them at Ramona High School in 1974. Mary Matlock testified that Boyde was in a group which was throwing bricks at her car in 1974.

Robert Gomez, Boyde's CYA parole officer, testified that Boyde was committed to CYA in 1972 on charges which included escape from juvenile hall and receiving stolen property. Boyde was recommitted in 1974 for assault and throwing an object at a vehicle. Gomez stated that Boyde failed to report for required meetings, failed to make diligent effort to find work, and generally failed to make "any offer to rehabilitate himself or engage in any kind of productive conduct."

Testimony from three police officers regarding their contacts with Boyde included information about Boyde's untruthfulness (Detective Smith), Boyde's possession of stolen property (Detective Knofflock), and his possession of marijuana in jail (Deputy Nelson).

Evidence of Boyde's escape plan consisted of two letters he had written and testimony by two fellow jail inmates that Boyde planned to escape from the roof of the

jail and use a gun to subdue the guard if necessary. Although the plan never ripened into an attempted escape, the trial court permitted the evidence on the theory that Boyde and Cecil Moore had entered into a conspiracy to effect Boyde's escape.

Ronnie English, who was serving a jail term for assault, testified as follows: He became friendly with Moore while working in the jail kitchen. Moore had known both Ellison and Boyde for a long time. English saw Moore read a letter he had received from Boyde and, at Moore's request, helped him read the letter and a map. He discussed the plan with Moore, and Moore told him that he was going to help Boyde. English saw Moore receive a second letter from Boyde. After the second letter Moore told him he wanted no part of Boyde's plan to kill the deputy. Therefore he would just leave the gun and the wirecutters on the roof, but he would not wait on the roof all night as Boyde requested. English reported the letters to jail authorities who then photocopied them and returned them to Moore's cell. English was never part of the conspiracy.

Moore testified that he had talked with Boyde about the escape plan before receiving the letters. Although he had told Boyde he would help him, he changed his mind when he read the first letter which talked about killing the deputy. Later, however, on cross-examination Moore said that from the start he had never intended to help Boyde escape.

Deputy Baker, who was familiar with Boyde's handwriting from her censorship of his mail, identified the handwriting on the two letters as Boyde's. Sargent Zavetz testified that English had passed the escape plan letters to him and corroborated information in the letters about the jail routines and layout.

To fend off the prosecutor's offer to produce a parolee who had allegedly purchased a gun for use in the escape,

Boyde's counsel stipulated that the publication of the letters would constitute an overt act for purposes of establishing the conspiracy.

2. Defense Evidence.

Boyde presented testimony by his mother, two sisters, stepfather, ex-girlfriend and her mother, and his wife. His family was poor; he did not know his father; his mother had little education and worked as a domestic. Boyde had health problems from a young age and did poorly in school. As a young teenager he began to skip school, stay out late, and have trouble with the police. The family was not able to obtain counseling through the school system and could not afford to do so privately. Boyde had few friends and was uncomfortable with the strictness of his stepfather who came into the home when he was eight. Boyde's former girlfriend and his sister both testified that they found him to be a giving person, good with children and good to them. His wife testified that he had looked hard for work after his release from prison in November 1980, but his efforts were unsuccessful. She married him after his arrest for these crimes and was shocked at the crimes he was accused of because it seemed so unlike him.

A psychologist testified that Boyde has an inadequate personality with limited internal resources and low self-esteem. He is often depressed and is socially isolated. Boyde's intelligence level is on the edge between dull-normal and borderline.

B. Improper Evidence in Aggravation.

Boyde correctly contends that certain evidence was improperly admitted because it did not relate to any of the statutory aggravating factors. (See *People v. Boyd* (1985) 38 Cal.3d 762 [215 Cal.Rptr. 1, 700 P.2d 782].) Most of the evidence presented about Boyde's CYA commitment and parole falls into this category in that it did

not pertain to a prior felony conviction (§ 190.3, subd. (c)) or criminal activity involving force or violence (§ 190.3, subd. (b)). The same may be said for testimony by officers about Boyde's untruthfulness, possession of stolen property and possession of marijuana in jail. Also improper was testimony by victims of other offenses about the impact that the event had on their lives.⁵

Evidence of two other incidents was improperly admitted because the prosecution had failed to give proper notice, as required by section 190.3. Those incidents were the 1974 assault on Colleen Dietzman and Karen Smith and the 1976 robbery of Edward Wall.

We do not agree, however, with Boyde's contention that evidence of the escape plan was improperly admitted. Contrary to Boyde's claim, violent criminal activity need not have preceded the charged crimes to be admissible under section 190.3, subdivision (b). (See *People v. Balderas* (1985) 41 Cal.3d 144, 202 [222 Cal.Rptr. 184, 711 P.2d 480].) The plan called for use of a gun to subdue the guard if necessary and thus met the force or violence requirement for admissibility under subdivision (b). The remaining question is whether the evidence revealed the technically complete crime of conspiracy to qualify as "criminal activity" under subdivision (b). (See *People v. Phillips, supra*, 41 Cal.3d at p. 72.)

Boyde contends that a technically complete crime was not shown because there was no independent evidence of the agreement and no overt act in furtherance of the conspiracy was established. (See Evid. Code, § 1423;

⁵ The testimony also was arguably improper under *Booth v. Maryland* (1987) 482 U.S. — [96 L.Ed.2d 440, 107 S.Ct. 2529], which condemned the admission of detailed testimony at the penalty phase by family members regarding the impact that the victim's death had had on their lives. Unlike *Booth*, the testimony here was by the actual victims themselves who in the course of describing Boyde's criminal conduct also mentioned the effect it had on them. The improper testimony was far more fleeting than that in *Booth* and, in our view, could not have affected the verdict.

People v. Leach (1975) 15 Cal.3d 419, 430-431, fn. 19 [124 Cal.Rptr. 752, 541 P.2d 296].) He is mistaken. He stipulated that the sending of the letters constituted the overt act. As to the agreement, Moore's actions are sufficient circumstantial evidence to show the agreement since all that is necessary is a prima facie showing before consideration of coconspirator's admissions. (See *People v. Jourdain* (1980) 111 Cal.App.3d 396, 404-406 [168 Cal.Rptr. 702]; *People v. Perez* (1978) 83 Cal.App. 3d 718, 728-730 [148 Cal.Rptr. 90].) Here we have Moore's receipt of Boyde's letter, his reading and studying it with English, their discussion of the maps and plans, and Moore's receipt of the second letter. Moore told English after receipt of the first letter that he was going to help Boyde. The fact that Moore testified that he never planned to help Boyde does not nullify the other evidence of his agreement; it merely went to the weight of the evidence for the jury to consider in determining whether the conspiracy had been proved beyond a reasonable doubt. The instructions on conspiracy were sufficient; sua sponte instructions on the elements of the offense were not required. (See *People v. Phillips, supra*, 41 Cal.3d at p. 68.)

The evidence that was improperly admitted in aggravation was relatively insignificant in light of the properly admitted evidence of Boyde's commission of a string of four robberies in 1976, his involvement in the brick-throwing incident in 1974, and his conspiracy to escape from the jail while the current charges were pending. We therefore conclude that the improperly admitted evidence could not have affected the verdict or have misled the jury in its penalty determination.

C. Jury Instructions.

1. Factor (k).

The court gave the complete version of CALJIC No. 8.84.1 as it read before its amendment in response to our suggestion in *People v. Easley* (1983) 34 Cal.3d 858, 878,

footnote 10 [196 Cal.Rptr. 309, 671 P.2d 813], for clarification of the subdivision (k) factor of section 190.3 (hereafter referred to as factor (k)). The version of factor (k) that was given read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CALJIC No. 8.84.1 has since been amended to add the following phrase to factor (k): "and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (1986 rev.)

Boyde contends that the unadorned version of factor (k) that was given may have misled the jury into thinking it could not consider evidence relating to his background and character. We do not agree. The jury was instructed to consider "all of the evidence which has been received during any part of the trial of this case." All of the defense evidence at the penalty phase related to Boyde's background and character. Although the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence could not be considered. Defense counsel argued at length for giving great weight to defendant's troubled background and personality deficiencies and referred to factor (k) as the catchall provision. It is inconceivable the jury would have believed that, though it was permitted to hear defendant's background and character evidence and his attorney's lengthy argument concerning that evidence, it could not consider that evidence.

2. Antisympathy.

No antisympathy instruction (CALJIC No. 1.00) was given at the penalty phase, but it was given at the guilt phase. For reasons stated above, we do not think that a reasonable juror would have believed he was not al-

lowed to consider sympathy for the defendant at the penalty phase. Although the prosecutor argued against basing the weighing process on "emotion, sympathy, pity, anger, hate or anything like that because it is not rational if you make a decision on that kind of basis," the thrust of his argument was to implore the jury to make a reasoned decision, to rationally evaluate the evidence.

3. Failure to Edit CALJIC No. 8.84.1.

Boyde contends the court should have deleted all inappropriate mitigating factors from the instruction. We rejected an identical claim in *People v. Ghent*, *supra*, 43 Cal.3d 739, 776.

Boyde also contends the trial court should have modified the instruction to make it clear that section 190.3, subdivision (c) applied only to items that were not already covered by subdivisions (a) and (b). We discussed a similar claim in *People v. Melton* (1988) 44 Cal.3d 713, 764-765 [244 Cal. Rptr. 867, 750 P.2d 741], and concluded that although subdivision (a) ("circumstances of the crime of which the defendant was convicted in the present proceeding") is limited to the charged crimes whether or not violent, subdivisions (b) (violent criminal activity) and (c) (prior felony convictions) may properly overlap when a prior felony conviction involved force or violence. Thus the only clarification called for was that the charged crimes should be considered only under subdivision (a). We do not believe, however, that a reasonable jury would have considered the circumstances of the crime more than once.

4. Excessive Special Circumstances.

Boyde contends that the trial court erred in submitting both the robbery and kidnapping-for-robbery special circumstances to the jury because the offenses were committed as part of a single, indivisible course of criminal conduct. We rejected a virtually identical claim in *People v. Melton*, *supra*, 44 Cal.3d 713, 765-769.

5. *Instruction on Weighing Aggravating and Mitigating Circumstances.*

The jury was instructed in the language of section 190.3 (former CALJIC No. 8.84.2) as follows: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." Boyde contends that the jury was thereby misled as to its role in determining the appropriateness of the death penalty.

In *People v. Brown*, *supra*, 40 Cal.3d at pages 538-545, we concluded that the directive of section 190.3 that the trier of fact "shall impose a sentence of death" if it "concluded that the aggravating circumstances outweigh the mitigating circumstances" did not impermissibly restrict the jury's constitutional sentencing discretion. We rejected the defendant's proffered mechanistic construction of the words "outweigh" and "shall" in favor of one which directed the jury to weigh the various factors and determine under the relevant evidence which penalty is appropriate in a particular case. We noted, however, that the statutory language—particularly the words "shall impose"—left room for confusion about the jury's role and therefore directed courts in the future to instruct on the scope of the jury's discretion. As to cases tried before our opinion, we concluded that each must be examined on its own merits to determine whether the sentencer may have been misled to the defendant's prejudice regarding the scope of its sentencing discretion. (*Id.* at p. 544, fn. 17.)

Our concerns in *Brown* were essentially two: The first was that the jury might be confused about the nature of the weighing process, that it is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process. Our second concern was that use of the word "shall" might mislead the jury as to the substance of the ultimate determination it

was called upon to make. In *Brown*, we concluded that the statutory language "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case." (40 Cal.3d at p. 541.)

In the present case, both the prosecutor and defense counsel repeatedly told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. They also made it clear that the jury was free to assign whatever weight it wanted to any particular factor. Although the prosecutor argued that the jury was obliged (i.e., it "shall") to return a death verdict if it found that the aggravating factors outweighed the mitigating even slightly, he also told the jury that its ultimate determination was: "Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty." In his final summation, the prosecutor stated, "and the point now becomes, and the only question is, should it [the death penalty] be or should it not be imposed." Defense counsel also made it clear the ultimate penalty was the jury's choice: "Can (k) outweigh (a) through (j)? If you find that it does, it does, and that is your choice. That is what we are asking you to do."

In our view, the *Brown* concerns were satisfied here. The jury was clearly informed that the word "weigh" did not connote mere counting, but rather involves a qualitative judgment. The jury was also adequately informed as to its discretion in determining whether death was the appropriate penalty. Obviously, when jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they

necessarily understand they have discretion to determine the appropriate penalty. The task of assigning weights to factors is not an arid exercise performed in a vacuum; it is the very means by which the jury arrives at its qualitative and normative decision as to the appropriate penalty. We recognized this in *Brown*, where we explained: "Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor 'k' as we have interpreted it. [Fn.] By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. *Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.*" (40 Cal.3d at p. 541, italics added.)

The dissent, however, seems to assume that the jury must go through two separate assessments in arriving at a penalty determination. This assumption is unfounded. As we explained in *Brown*, the jury makes its appropriateness determination during its normative weighing process. Then, based upon its determination of the weight of mitigating factors relative to aggravating factors, it chooses the appropriate penalty—life without possibility of parole if mitigating circumstances outweigh aggravating, or death if aggravating circumstances outweigh mitigating. This is explained in the 1986 revision of CALJIC No. 8.84.2, which states in pertinent part: "In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of

death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

Relying on the prosecutor's reference to the statutory "shall," the dissent concludes that this particular jury likely believed that its discretion and responsibility to assign weight to the various factors existed independently of and apart from any responsibility to determine penalty. Support for this proposition is purportedly found in the prosecutor's comments during individual, sequestered voir dire—comments directed to determining whether a prospective juror could, if the circumstances warranted it, discharge his responsibility in the penalty phase of the trial to impose the appropriate penalty.⁶ The dissent thus adopts the novel view, unsupported by any cited authority, that remarks made by the prosecutor before trial to unsworn jurors during individual voir dire—which jurors have not yet been instructed on the law by the court—carry forward to create reversible error in the penalty phase of trial.

The dissent also mistakenly faults the prosecutor for urging the jurors to base their decision on the evidence presented as measured by the guidelines set forth in the court's instructions rather than by simply consulting their jurors to limit the "sentencing considerations to record evidence," a completely proper request according to the United States Supreme Court in *California v. Brown*, *supra*, 479 U.S. at page — [93 L.Ed.2d at p.

⁶ The comments, in any event, have been magnified by the dissent. Each was a result of the prosecutor's contrasting the current death penalty law with the former one that was unconstitutional for lack of standards governing the jury's exercise of discretion in sentencing. (See *Furman v. Georgia* (1972) 408 U.S. 238 [33 L.Ed.2d 346, 92 S.Ct. 2726].) He was attempting to explain that the current law does not leave jurors "rudderless," but instead provides concrete standards to guide the jury's exercise of discretion.

941]. We find no impropriety in such argument. It is a misinterpretation of the prosecutor's argument to assert, as the dissent does, that he was telling the jury it had no discretion to determine the appropriate penalty. We conclude that the jury was adequately informed that the manner in which it weighed mitigating versus aggravating circumstances was in its sole discretion and that it thereby determined whether death was appropriate.

D. *Constitutionality of 1978 Death Penalty Law.*

Boyde contends that the 1978 death penalty law violates the Eighth Amendment's proscription of "arbitrary" sentencing procedures because it does not provide adequate safeguards to protect against arbitrary death judgments. He also argues the 1978 law is unconstitutional in various other respects. Each of his constitutional arguments has been considered and rejected in recent opinions. (See e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113].)

E. *Prosecutorial Misconduct.*

The prosecutor asserted during closing argument that the absence of a mitigating circumstance constituted aggravation. Although we stated in *People v. Davenport* (1985) 41 Cal.3d 247, 290 [221 Cal.Rptr. 794, 710 P.2d 861], that such argument "should not in the future be permitted," we did not rely on the point in reversing the penalty judgment. The trial in this case took place in 1982, well before our *Davenport* opinion. The argument here occurred only once at the outset when the prosecutor went through the list of aggravating and mitigating factors in light of the evidence presented. Though erroneous, we do not believe the prosecutor's argument can be deemed to have misled the jury. The trial court had instructed the jury to consider the sentencing factors only "if applicable." We generally presume that the jurors follow the court's instructions, and we are presented with no reason to believe that the jurors did not do so.

F. *Ineffectiveness of Counsel.*

Boyde claims that his trial counsel was ineffective for failing to object to the escape evidence and the evidence in aggravation for which proper notice had not been given. His claim is unavailing since we have reviewed the matters cited on their merits and found no prejudicial error. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 584 [189 Cal.Rptr. 855, 659 P.2d 1144].)

G. *Application for Modification of Judgment.*

In every case in which a death penalty is returned, section 190.4, subdivision (e) requires the trial judge to make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 792.) The judge must "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances . . . and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings." (§ 190.4, subd. (e).)

Boyde contends the court's denial of the motion to modify the judgment was based on its erroneous belief that the evidence he presented at the penalty hearing did not constitute mitigation. He points to the court's statement: "There is little, if anything, that can be said in way of mitigation against imposition of the death penalty, but there are many factors in aggravation. . . ." In context, however, the court's statement was merely a reference to the weight he thought should be given the mitigating evidence. The court never indicated it thought the evidence could not be considered.

H. *Correction of Abstract of Judgment.*

Boyde contends, and the Attorney General agrees, that the abstract of judgment and minute order should be corrected to conform to the oral judgment pronounced on count II (kidnapping for robbery) of life imprisonment with possibility of parole, with sentence on that count stayed pending appeal.

VI. DISPOSITION

The judgment is affirmed in its entirety. The abstract of judgment is ordered corrected to conform to the oral judgment pronounced as to count II (kidnapping for robbery) of life imprisonment, with execution of sentence on that count stayed pending execution of the sentence of death.

Lucas, C. J., Eagleson, J., and Kaufman, J., concurred.

ARGUELLES, J., Concurring and Dissenting.—I concur in the majority opinion insofar as it affirms the judgment of guilt and the special circumstance findings but respectfully dissent insofar as it affirms the penalty judgment. In my view, the record in this case, taken as a whole, demonstrates that the jury was misled with regard to the nature of its task and the scope of its discretion at the penalty phase of the trial. (See *People v. Brown* (1985) 40 Cal.3d 512, 538-544 [220 Cal.Rptr. 637, 709 P.2d 440]; *People v. Milner* (1988) 45 Cal.3d 227, 253-258 [246 Cal.Rptr. 713, 753 P.2d 669].) Accordingly, I would reverse the penalty judgment and remand for a new penalty trial before a properly advised jury.

I

In instructing the jury at the conclusion of the penalty phase, the trial court, after enumerating the various aggravating and mitigating factors contained in the 1978 death penalty law, advised the jury: "It is now your duty to determine which of the two penalties, death or confinement in the State Prison for life without possibility of parole shall be imposed on the Defendant. [¶] After having heard all of the evidence and having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] *If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the State Prison for life without the possibility of parole.*" (Italics added.) The court gave no further instructions either elaborating on the scope of the jury's discretion or explaining that, in weighing the aggravating and mitigating circumstances, the jury must make its own normative judgment of

whether death or life without possibility of parole is the appropriate punishment under all the circumstances.

In *Brown, supra*, 40 Cal.3d 512, 538-544, this court recognized that the wording of the instruction which the trial court gave in this case, although tracking the language of the 1978 statute, "leave[s] room for some confusion as to the jury's role" in determining the appropriate penalty. (40 Cal.3d at p. 544, fn. 17.) In *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277 [232 Cal. Rptr. 849, 729 P.2d 115], we explained in some detail the possible confusion that may be engendered by the wording of such an instruction.

As we explained in *Allen*, "[o]ur concern in *Brown* was that the unadorned statutory instruction might in two interrelated ways lead the jury to misapprehend its discretion and responsibility. [¶] First, we pointed out that the jury might be confused about the nature of the weighing process. As we observed, '[T]he word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider.' [Citation.] [¶] Second, we were concerned in *Brown* that the unadorned instruction's phrase, 'the trier of fact . . . shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances' . . . , could mislead the jury as to the ultimate question it was called on to answer in determining which sentence to impose. Although the quoted phrase could be understood to require a juror (i) to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal view as

to the appropriate sentence, and then (ii) to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe death is the appropriate sentence under all the circumstances, we concluded in *Brown* that the statute was not intended to, and should not, be interpreted in that fashion. Instead we stated: 'By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty *unless*, upon completion of the "weighing" process, *he decides that death is the appropriate penalty under all the circumstances*. Thus *the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.*' [Citation.]" (42 Cal.3d at pp. 1276-1277, italics added in *Allen*.)

Because of the potential ambiguity inherent in a jury instruction which simply tracks the statutory language, *Brown* indicated that in cases tried after that decision, trial courts should give clarifying instructions, explaining to the jury the full scope of its discretion and responsibility under the 1978 law as interpreted in *Brown, supra*, 40 Cal.3d 512. With respect to cases, like the present matter, which were tried prior to *Brown*, we stated that we would examine each prior case "on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." (*Brown, supra*, 40 Cal.3d at p. 544, fn. 17.) Since *Brown*, we have undertaken such a review in numerous death penalty appeals. (See, e.g., *Allen, supra*, 42 Cal.3d 1222, at pp. 1276-1280; *People v. Myers* (1987) 43 Cal.3d 250, 273-276 [233 Cal.Rptr. 264, 729 P.2d 698]; *People v. Howard* (1988) 44 Cal.3d 375, 434-436 [243 Cal.Rptr. 842, 749 P.2d 279]; *People v. Hendricks* (1988) 44 Cal.3d 635, 650-651 [244 Cal.Rptr. 181, 749 P.2d 836]; *People v.*

Melton (1988) 44 Cal.3d 713, 761-762 [244 Cal.Rptr. 867, 750 P.2d 741]; *Milner, supra*, 45 Cal.3d 227, 253-258.)

The majority, of course, has undertaken such a review here, and has concluded that the jury was not misled in this case. (See, *ante*, pp. 252-253.) I agree with the majority that the first area of concern identified in *Brown* was not a problem in this case; in light of the entire record, particularly the closing arguments of both counsel, there is no reasonable likelihood that the jury thought that the "weighing" process was a "mechanical" procedure or did not realize that it could give different qualitative weight to each of the various aggravating and mitigating circumstances.

I cannot agree, however, with the majority's conclusion that the second concern of *Brown* was adequately satisfied. Indeed, when the entire record is considered, I think it is rather clear that the jury in this case was misled on this second, most fundamental point, i.e., on "the ultimate question [which] it was called on to answer in determining which sentence to impose." (*Allen, supra*, 42 Cal.3d 1222, 1277.)

As we have seen, in *Brown* and *Allen* we recognized that the crucial phrase in the 1978 law—"the trier of fact . . . shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances"—is, on its face, reasonably susceptible to varying interpretations, and "could be understood to require a juror (i) to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal view as to the appropriate sentence, and then (ii) to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe death is the appropriate sentence under all the circumstances" (*Allen, supra*, 42 Cal.3d 1222, 1277.) As *Allen* emphasized, however, "we concluded in *Brown* that

the statute was not intended to, and should not, be interpreted in that fashion." (*Ibid.*, italics added.) Instead, we held in *Brown* that the statute "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*Brown, supra*, 40 Cal.3d at p. 541.)

The record in this case reveals that from the very outset of the trial proceedings the jurors were repeatedly misinformed on this precise point. The source of the problem lay in the fact that both the prosecutor and the defense counsel misinterpreted the above-quoted phrase in the 1978 law in the very manner described in *Allen*, and proceeded on the assumption that, under the 1978 statute, each juror was not to make his or her own personal judgment of whether death was the appropriate punishment under all the circumstances. Instead, both counsel believed that the law required the jurors simply to weigh the aggravating and mitigating factors without regard to their own assessment of the appropriate punishment and to impose the death penalty if aggravation outweighed mitigation.

The attorneys' confusion on this point is evident from several quotations from the jury voir dire which appear in the majority opinion's discussion of an entirely separate issue, the *Witherspoon* claim (*Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770]). As the majority opinion indicates, the district attorney told one prospective juror during voir dire "that the law requires a death verdict where aggravation outweighs mitigation, 'even if you personally don't think the crime is worth it . . .'" (*ante*, p. 247), and defense counsel conveyed the same misunderstanding to the same juror, informing her that if a juror weighed the evidence and determined that aggravation outweighed mitigation "the law mandates that you come in with a finding of death, no matter what your personal feelings may be." (*Ante*, p. 246)

As a review of the entire voir dire reveals, the passages quoted in the majority opinion are by no means isolated or atypical statements.¹ Throughout the lengthy voir dire process, counsel repeatedly informed potential jurors of this erroneous view of the jury's task at the penalty phase, and repeatedly sought assurance from potential jurors that they would adhere to this understanding of their role and would resolve the question of penalty solely on the basis of whether aggravation outweighed mitigation or mitigation outweighed aggravation, without regard to the juror's own personal view of whether death or life without possibility of parole was the appropriate punishment under all circumstances.²

¹ At one point, the majority appears to imply that it may be improper to look to discussions between counsel and potential jurors during voir dire in determining whether or not the jurors properly understood the scope of their sentencing discretion under the 1978 law as interpreted in *Brown*. (*Ante*, pp. 254-255.) In *People v. Allen*, *supra*, 42 Cal.3d 1222, 1279-1280, however, this court—in evaluating a *Brown* claim similar to that at issue here—relied on a prosecutor's voir dire exchanges with potential jurors in finding that several comments made by the prosecutor during the penalty phase closing argument were not likely to have misled the jurors as to the scope of their sentencing discretion. If voir dire exchanges may be referred to in order to “cure” potential *Brown* error as they were in *Allen*, it is difficult to see a principled basis for refusing to consider such voir dire exchanges when they exacerbate, rather than alleviate, the potentially misleading impact of closing argument.

² Excerpts from the voir dire of several jurors who were chosen to sit on the jury illustrate the point.

“Q. [District Attorney] . . . Now, the way the law is now, you are going to be given certain aggravating and mitigating factors. That's what they are called, aggravating and mitigating.

“A. Right.

“Q. And it will be your job to evaluate the evidence presented not only at trial, but at the penalty portion, if we get there, and you will weigh the evidence and decide whether or not the aggravating circumstances outweigh the mitigating.

“A. Right.

“Q. If the law directs you to a verdict of death, even though given your druthers and your idea of what the crime is worth,

Furthermore, the prosecutor repeatedly suggested to potential jurors that one of the virtues of such a sen-

disagreeing with that, you are still obligated to follow the law even if the consequence is ultimately death.

“A. I understand that, also. I understand that the decision isn't based on where I think it is appropriate.

“Q. Right.

“A. No. I understand that.

“Q. It is essentially going to be a legal decision based upon rules given to you.

“A. Right.

“Q. Any problem with that format?

“A. I personally don't even know when it is appropriate and when the law says it is. I don't know that. So, those cases where I feel that it is appropriate, just my own personal—my own personal feelings. So that doesn't enter into it.

“Q. I think I come from about the same place that you do, in that I would feel uncomfortable if I didn't have any guidelines.

“A. Un-huh.

“Q. And I feel much better that I am told this is what is expected of me, and I think what you are telling me is you are willing to enter into that wholeheartedly, and you don't have any reservations—

“A. No, I don't.

“Q. —about applying the law?

“A. About applying the law, no, I don't.”

“Q. [District Attorney] There will be a list of, I think, nine or ten factors that you will have to guide you as you approach the evidence and you will be told that if you find the factors in aggravation outweigh those in mitigation, that you shall return a verdict of death. Doesn't say you may, doesn't say it is one of your choices, it says you shall return a verdict of death. [¶] Any problem with that?

“A. No.

“Q. What if you are faced with a situation, though, where you personally, if you had to write on a blank slate, would not make this crime a death penalty crime, yet as you go through the factors it is clear to you that the law requires that verdict. [¶] Can you put your own thoughts aside and follow the law?

“A. Yes, I could.

“Q. Even on a question like this, which is possibly life or death?

“A. Yes, I could put it aside.”

“Q. [District Attorney] So, what they have done is created a lot of things to look at, about nine or ten factors. And essentially

tencing procedure was that it relieved a juror of the responsibility of deciding "whether I personally think [the defendant] should die or not die" and contributed to the juror's "peace of mind" by enabling him to view his role as simply applying the law "as it has been passed."³ In light of the awesome nature of the responsi-

what you do is you take that evidence and plug it into the factors, and if you find that the ones that make the crime worse, those that aggravate it, outweigh the others you shall return a death penalty. If you find, on the other hand, that the factors in mitigation, make it less serious, outweigh it, you shall return a verdict of life without parole. [¶] Essentially, you are making a legal decision, you are trying to apply the law of the State of California, trying to do essentially the will of the people in deciding what is the appropriate penalty, what they have said to the appropriate penalty in this case. So, it is not so much you, personally, it is what you think the law requires.

"A. Uh-huh.

"Q. I think it is a better way, I would be much more satisfied sitting as a juror in that situation, I trust you would, too. [¶] But, what it may mean is it may mean that you personally if you had to do all over again, would not write the law that way. It might mean, 'Well, I don't think this crime deserves the death penalty,' yet as you look at what the factors are, you may be required to return a penalty of death. [¶] Can you put aside what you personally feel and follow the law even in that situation?

"A. I think I could."

³ "Q. [District Attorney] . . . The situation becomes most difficult, I think, when you are dealing about a question of life and death. The question as to whether or not the Defendant should get the death penalty or should not get the death penalty. Because they way the law is set up now, it is a very strict structure, there are a list of about nine or ten factors that you are to look at in deciding whether the death penalty should be imposed or whether life without possibility of parole should be imposed. [¶] And, I believe it is quite possible that you, personally, if you were writing on a blank slate or writing the law yourself would, in a particular case, not think the death penalty was appropriate, but yet the law says it is.

"A. Un-huh.

[Continued]

bility of personally determining whether death is the appropriate punishment for another individual, it is not surprising that the jurors readily agreed that they would prefer not to have to make that kind of personal moral judgment. (Cf. *Caldwell v. Mississippi* (1985) 472 U.S. 320, 332-333 [86 L.Ed.2d 231, 241-242, 105 S.Ct. 2633].)

After inculcating the jurors during voir dire on this erroneous view of their sentencing role, the prosecutor reiterated this misunderstanding of the applicable principles in closing argument at the penalty phase.

At the beginning of his penalty phase argument, the prosecutor read the language of the pre-*Brown* instruction that the trial court subsequently gave the jury and explained to the jury: ". . . the test is whether aggravating outweighs mitigating or mitigating outweighs aggravating. There is no requirement that I have to prove the aggravating outweighs beyond a reasonable doubt, beyond clear and convincing evidence. The test is whether, when you weigh the two, do the aggravating factors outweigh the mitigating factors or vice versa.

³ [Continued]

"Q. Will you be able to go along with the law?

"A. Yes.

"Q. Okay, this is a rule of law, not of people; and, if you substitute your personal ideas for the law, you are frustrating the will of society which you are a member of.

"A. Right.

"Q. Any problem with that idea?

"A. No.

"Q. I think it also, I don't know, but if I was sitting on a jury such as this, for me to recognize that what I am essentially doing is apply the law as it has been passed and I am not personally deciding whether or not I like the Defendant, don't like the Defendant, whether I personally think he should die or not die. I find it far easier or I find it, at least for my peace of mind, a better way to do it, then in fact what I am doing is applying the law.

"A. Yes, that is the same thing I was thinking, just kind of remove yourself from—

"Q. That's right . . ."

[¶] *If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death.*" (Italics added.)

Then, after discussing each of the individual factors at some length,⁴ the prosecutor returned to the question of what the law *required* of the jury. He stated: "We went through an extensive voir dire process in this case, and you were asked specifically, I think by myself, and I think I asked each and everyone of you, can you personally go along with this, personally commit yourself to the idea that even though you may have to make a difficult and emotionally touchy decision, can you do it, a personal commitment to what the law is going to require of you . . . [¶] The important thing is this personal commitment that you have here to be willing to follow the law and to put aside what you would like to do for your own, you know, your own feeling of feeling about it. [¶] Well, I am asking you now to follow the law as it is given to you by the Court and apply it to the evidence as presented . . . [¶] But, don't try to avoid the tough decision by sitting and trying to rationalize or

⁴ As the majority opinion acknowledges (*ante*, p. 255), in discussing the statutory factors the prosecutor erroneously told the jury that the absence of a mitigating factor constituted an aggravating factor. (See *People v. Davenport* (1985) 41 Cal.3d 247, 289-290 [221 Cal.Rptr. 794, 710 P.2d 861].) Thus, after completing his review of all of the factors up to factor (k), he told the jury: "it seems to me that before you even get to the last factor . . . you've got ten solid factors in aggravation, ten solid factors."

Although the impact of this type of so-called "*Davenport*" error (*supra*, 41 Cal.3d 247) may be reduced when it is clear that the jury realizes that its task is not simply to determine whether aggravation outweighs mitigation in an "objective" abstract sense but rather to determine whether, under all the circumstances, death or life without parole is the appropriate punishment, as discussed above there is very good reason in this case to fear that the jury did not properly understand this very point. Thus, in this case, the combination of the *Brown* and *Davenport* errors resulted in an increased prejudicial effect.

trying to seek a way out of a tough decision, you are going to have to face it head-on, you are going to have to go through each and every one of those factors and decide it. *Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty?*" (Italics added.)

Although the majority opinion interprets the last quoted sentence as indicating that the prosecutor was telling the jurors to personally decide for themselves whether or not they felt that death was warranted (i.e., "appropriate"), when viewed in the context of the entire record I do not believe that that is how that sentence would have been understood by the jury. As we have seen, the prosecutor had carefully instructed the jurors during voir dire that it was "the law"—rather than the jury's personal judgment—which determines whether the death penalty is "warranted," and that the law mandates that death be imposed if aggravation outweighs mitigation. In this setting, I do not think that the emphasized sentence would have been viewed by the jury as contradicting all the prosecutor had previously argued, but rather would have been understood simply as a reiteration of the prosecutor's theme.

Indeed, the prosecutor returned to that theme once again in his rebuttal closing argument. He stated: "The next thing is, you have to understand this is not a personal decision, it is not a situation where we toss the case to you and say, 'Hey, how do you feel today, do you want to impose the death penalty or not.' I don't know about you, but it is not something that I would like to do on a day-to-day basis, make that kind of decision. [¶] What we said to you is here is the rule of law, here is the evidence, please apply the evidence to the rules of law and make a decision based upon what the law requires of you, same process that you went through in deciding guilt. [¶] *You are deciding the just punishment according to law. You're not deciding whether I like*

him, don't like him, *whether it's my decision to impose the death penalty.* [¶] You have been given very clear guidelines, eleven of them, to direct your decision in this case. You have taken an oath that you would be willing to do that, and that's what you have to do." (Italics added.)

Then, at the end of his argument, the prosecutor advised the jury: "I would suggest, as you go through this evidence and you go through each factor, that you go through them one by one and decide whether that factor aggravates or that factor mitigates. [¶] If you find at the very end that every factor that you've heard aggravates this crime, the penalty is, obviously, apparent, it is clearly the death penalty. But, let's say you find one factor mitigates and the other factors all aggravate. It is not a process of counting, it's not 10 to 1, it is a process of weighing. And, you should decide whether or not that one factor in mitigation outweighs all those factors in aggravation and then decide the case. [¶] And the instruction is specific on this and I don't know if Defense Counsel is inviting you not to do this, that he is inviting you to make a decision independent of what the instruction is; ^[5] but, this is what your obligation is, if you

⁵ At this point, the prosecutor was apparently referring to the brief comment in defense counsel's closing argument that is quoted by the majority: "Can (k) outweigh (a) through (j)? If you find that it does, it does, and that is your choice. That is what we are asking you to do." Although this remark may have suggested to the jury that it had the *power* to find that mitigation outweighed aggravation and thus to decline to impose the death penalty, defense counsel never argued that the statutory "aggravation outweighs mitigation" formulation was intended to require each juror to make his or her own normative judgment as to whether death was the appropriate punishment, and thus the quoted comment of defense counsel was vulnerable to the prosecutor's argument that counsel was inviting the jury to make a decision "independent of" the court's instruction. This is particularly so since, during voir dire, defense counsel never took issue with the prosecutor's repeated assertion that the law required the imposition of the death penalty

conclude the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death."

Viewing the record as a whole, I believe the jury in this case was clearly misled as to the scope of its discretion and the nature of its role in determining sentence. During voir dire, the potential jurors were repeatedly told that their task at the penalty phase was not to make a personal determination as to whether they thought death or life without parole was the appropriate punishment, but rather simply to determine whether the designated aggravating factors outweighed the mitigating factors. That misunderstanding of the jury's function was not corrected by the trial court's penalty phase instruction nor by closing argument of counsel.

Contrary to the majority's suggestion, my conclusion that the jury was misled in this case does not rest on any "assum[ption] that the jury must go through two separate assessments in arriving at a penalty determination." (*Ante*, p. 254.) If the jury properly understands that the weighing process is the means by which each juror determines whether he or she personally believes that death or that life imprisonment without possibility of parole is the appropriate punishment for the defendant in light of all the aggravating and mitigating factors, I have no doubt that jurors are quite capable of making an "appropriateness determination" in the course of the weighing process itself. But the jurors in this case were never instructed that the weighing process was a means for them to make such a personal appropriateness determination. Instead, they were affirmatively misinformed that it was *not* their responsibility to decide whether or not they personally believed that death was the appro-

if aggravation outweighed mitigation, without regard to the jurors' personal views as to appropriateness of the penalty under all the circumstances.

priate punishment, and were told that, under the law, they were only to decide whether aggravation outweighed mitigation without regard to their personal view as to the appropriate penalty.

Although the majority purports to find support for its determination that the jury was not misled in the language of the 1986 revision of CALJIC No. 8.84.2 (see *ante*, p. 254)]—an instruction that was not given to this jury—in fact that revised instruction contains a crucial passage which provides jurors with an entirely different message than the one which the prosecutor conveyed to the jurors in this case. The revised instruction specifically informs the jury that “[t]o return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.” (Italics added.) As we have seen, the prosecutor in this case never suggested to the jurors that they had to determine whether the aggravating evidence in comparison with the mitigating evidence was “so substantial . . . that it warrants death instead of life without parole,” but on the contrary argued that if the jurors found that the aggravating factors even slightly outweighed the mitigating factors the jurors were obligated to return a verdict of death and that it was not each juror’s responsibility to determine “whether it’s my decision to impose the death penalty.”⁶

⁶ Indeed, although the majority finds no *Brown* error in this case, the Attorney General has never argued that the jury was accurately informed of its proper penalty phase role under *Brown*, *supra*, 40 Cal.3d 512. In the only post-*Brown* brief filed by the Attorney General, the Attorney General simply argues that *Brown* was wrongly decided and should be overruled. We have, of course, recently reaffirmed the *Brown* decision. (See, e.g., *Milner*, *supra*, 45 Cal.3d 227, 253-258; see also *People v. Guzman* (1988) 45 Cal.3d 915, 958-959 [248 Cal.Rptr. 467, 755 P.2d 917].)

Under these circumstances, I conclude that the penalty judgment should be reversed and the case remanded for a new penalty trial before a jury that is properly informed as to its responsibility and discretion in determining the appropriate penalty. (See *Milner*, *supra*, 45 Cal.3d 227, 256-268.)

Mosk, J., and Broussard, J., concurred.

Order Due
November 9, 1988

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

Crim. No. SOO4447
22584

PEOPLE,

Respondent

v.

RICHARD BOYDE,

Appellant

ORDER DENYING REHEARING

Appellant's petition for rehearing DENIED.

Mosk, J., Broussard, J. and Arguelles, J., are of the opinion the petition should be granted.

/s/ [ILLEGIBLE]
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 88-6613

RICHARD BOYDE,

Petitioner

v.

CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 5, 1989

6
No. 88-6613

Supreme Court, U.S.

FILED

AUG 11 1989

JOSEPH F. SPATOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD BOYDE,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of California

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the capital sentencing proceeding in petitioner's case violate Eighth and Fourteenth Amendment requirements where the California statutory list of 11 exclusive aggravating and mitigating factors with which the jury was instructed limited the sentencer's consideration to any other mitigating circumstance "which extenuates the gravity of the crime" and thereby precluded petitioner's jury from giving mitigating effect to evidence of his character and background not immediately related to the circumstances of the crime in determining whether a sentence less than death is the appropriate punishment?

2. Did the Eighth and Fourteenth Amendments permit the trial judge to instruct petitioner's penalty phase jury that, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death," and does such instruction require reversal of the resulting capital sentence because it precluded the jury from making a reasoned moral judgment that death rather than life imprisonment without parole was the proper sentence in his case.

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OPINION BELOW

The opinion of the Supreme Court of California affirming the judgment of conviction and sentence of death is reported in *People v. Boyde*, 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25 (1988). It is set forth in the Joint Appendix (hereafter, "J.App.") at pages 40-105.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(3). The judgment of the Supreme Court of California was entered August 11, 1988, and on November 9, 1988 that court made its order denying rehearing. A timely petition for writ of certiorari was filed on February 7, 1989. Certiorari was granted on June 7, 1989. The Supreme Court of California has stayed petitioner's execution pending final determination of the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, which provide in relevant part:

"Excessive bail shall not be required . . . nor cruel and unusual punishment inflicted."

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

This case also involves California Penal Code §§ 190.2 and 190.3. These lengthy statutes are set out verbatim in Appendix D of the petition for writ of certiorari.

STATEMENT OF THE CASE

This case presents two questions under the Eighth and Fourteenth Amendments to the United States Constitution. Each concerns limitations expressed in the trial

court's instructions—repeatedly reinforced by the prosecutor's misleading statements—which petitioner has challenged as impermissibly circumscribing the role and scope of the jury's determination as to whether a sentence of death or life imprisonment without parole was appropriate in his case.

The focus is on two jury instructions purporting to apply Cal. Penal Code § 190.3, found in 1 California Jury Instructions, Criminal (4th ed. 1979) at 335-336 (hereafter "CALJIC 8.84.1") and 337-338 ("CALJIC 8.84.2"), both of which are no longer in use in California sentencing proceedings. See now 1 California Jury Instructions, Criminal (5th ed. 1988) at 409-410 (CALJIC 8.85) and 416-417 (CALJIC 8.88). In two cases decided following petitioner's trial, constitutional challenges to the same instructions as were given in his case resulted in substantially revised language that has been used in instructing California juries in all subsequently-tried capital cases. See *People v. Easley*, 34 Cal.3d 858, 878, n. 10 (1983) (disapproving former CALJIC 8.84.1)¹ and *People v. Brown*, 40 Cal.3d 512, 544-545, ns. 17 & 19 (1985) (acknowledging confusion in CALJIC 8.84.2 and approving proposed revision).² Nevertheless although petitioner's case was tried under the previous instructions,

¹ The complete instruction from CALJIC 8.84.1 given at petitioner's trial is set forth in Appendix A, along with the revised version now numbered 8.85 taken from the 1988 edition of CALJIC (which includes the language adopted in conformance with *Easley*).

² The complete instruction from CALJIC 8.84.2 given at petitioner's trial is set forth in Appendix B, along with its 1988 revised form renumbered 8.88. The proposal noted in *Brown*, 40 Cal.3d at 544-545, n. 19, was adopted verbatim and is carried over verbatim in the present version.

the California Supreme Court sustained his sentence of death.

Petitioner Boyde's case presents quite graphically the constitutional dilemma that the subsequent modification of these two instructions was expressly designed to correct. The first—subdivision (k) factor of § 190.3—explicitly limited the sentencer's consideration of mitigating evidence to "[a]ny other circumstance which *extenuates the gravity of the crime* even though it is not a legal excuse for *the crime*" (emphasis added), thus precluding the jury from giving effect to mitigating circumstances bearing on petitioner's character or background that were *unrelated* to the crime. Virtually all of petitioner's considerable mitigating evidence fell into this category.

The second instruction implemented the directive of § 190.3 that the trier of fact "shall impose a sentence of death" if it "concluded that the aggravating circumstances outweigh the mitigating circumstances," former CALJIC 8.84.2.³

Under this instruction, petitioner's jury was afforded no vehicle for exercising the reasoned moral judgment as to whether death or life imprisonment without parole was the appropriate sentence. Because the prosecutor repeat-

³ The successor instruction, CALJIC 8.88 (see Appendix B), directs that jurors "are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider" and "to determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances," and further, that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

edly emphasized to petitioner's jury the misleading view that CALJIC 8.84.2 left it no discretion under law—even if there is a “slight outweigh”—and finally, because petitioner's more than two volumes of transcript evidence of mitigating evidence plainly reinforces the risk that the death penalty was imposed “in spite of factors which may call for a less severe penalty,” *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion), this instruction must be held unconstitutional under the Eighth and Fourteenth Amendments.

On September 28, 1981, petitioner and codefendant Carl Franklin Ellison (not a party herein) were charged by information filed in the Superior Court of the State of California in and for the County of Riverside (case No. CR-18348) with the crimes of murder, robbery, and kidnapping for robbery. The offenses were allegedly committed on or about January 14, 1981. Two “special circumstances”—murder during commission of a robbery and murder during the commission of kidnapping for robbery—were alleged, thus making this a capital case. Cal. Penal Code, § 190.2, subdivisions (a)(17), paragraphs (i) and (ii). Petitioner was further charged with having suffered two prior felony convictions. He alone was additionally charged in the information with the commission of robbery and kidnapping for robbery, on January 5, 1981 (these further charges are not involved in the within petition). Clerk's Transcript 1-6.

The instant offenses arose from the robbery of a convenience store in Riverside, California, after which the clerk of the store was taken to a nearby orange grove and fatally shot. The gun that probably was used to kill the victim was subsequently located in Ellison's home; it belonged to his mother. The car used to commit the robbery belonged to the Ellison family. Co-defendant Ellison

waived a jury trial; he was tried by the same judge who simultaneously presided over petitioner's jury trial in the consolidated proceeding. Both petitioner and co-defendant Ellison testified before the jury in their own defense. Each acknowledged participation in the robbery and kidnapping, but contended the other shot the victim. In Ellison's earlier statements to the police, he admitted shooting the victim himself. *People v. Boyde*, 46 Cal.3d 212, 222-223, 227-231 (1988).

Petitioner was convicted on all charges, as well as of the two special circumstances. The jury also made a special finding that petitioner “personally killed [the victim] with express malice aforethought and premeditation and deliberation.” Ellison was convicted by the court of first degree murder and the allegations of special circumstances were found true. However, at the sentencing hearing the judge struck the special circumstances as to Ellison which permitted imposition of the more lenient sentence of 25 years to life imprisonment. 46 Cal.3d at 221, 231.

In the penalty phase of petitioner's jury trial, the prosecution presented evidence of prior offenses by petitioner, of an unexecuted plan by him to escape from the county jail during the instant trial, and concerning other misdeeds; also certain police officers and petitioner's former probation officer testified about various contacts with him. 46 Cal.3d at 247-249. The defense offered extensive testimony about petitioner's disadvantaged childhood.

Richard Boyde was born in rural Arkansas. His mother labored in the fields as a farm hand, and shared a house with 12 or 15 others. By the time he was born, his 23-year-old mother had already given birth to six children by a failed marriage. Richard, however, was illegitimate, and his father moved to Florida soon after he was born; the

father, for whom petitioner is named, was apparently later killed in Florida. RT 4487-4495.

When petitioner was four years old, it became impossible for his mother to care for him and his sister Helen. Both were sent to live with an aunt in Rubidoux, near Riverside, California. A few months later, the aunt notified petitioner's mother she could no longer keep the two children. Upon her arrival, his mother found both petitioner and his sister covered with untreated sores, apparently impetigo. When she attempted to get the children medical treatment, the doctor chased the family out of his office. Petitioner's mother stayed in California. She worked irregularly as a domestic—her education had stopped when she had to start working in the fields as a child of eight or ten—but there were many days when the family had no money for food and did not eat. By the time petitioner was about seven, his mother had remarried and their circumstances improved slightly. RT 4495-4509.

This deprived childhood, coupled with very low intelligence led him to develop a personality incapable of dealing with life's problems. RT 4325-4353, 4649-4703. Testimony by family and friends demonstrated that Richard Boyde had a good side: he was a kind husband and father, RT 4416-4426, 4612-4620; a hard worker, RT 4365; a person who is generous and pleasant to his intimates. RT 4551-4561, 4599-4600, 4618. His mother and stepfather testified to their repeated attempts to obtain counseling at schools for his evident problems, but that these efforts had been rebuffed; they explained how their poverty prevented them from obtaining the private counseling available to children who were better off. RT 4439-4448, 4520-4521. Other witnesses testified to petitioner's frustration at being unable to get a job because of his record. RT 4601-4604, 4614-4617. Dr. Offenstein, a

psychologist, gave his opinion that petitioner was not the kind of person who would deliberately go out and kill another; "he is not that anti-social." Rather, his behavior tends to be "responsive to how he feels at the immediate time." RT 3715.

At the conclusion of the penalty trial, the jurors were given an instruction setting forth an exclusive list of 11 factors to consider if applicable. The eleventh factor directed the jury to take into account: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." J.App. 34; RT 4833. However, the jurors were not instructed that they could consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See *Lockett v. Ohio*, *supra*, 438 U.S. at 604 (plurality opinion; emphasis and footnote deleted).

The trial court charged the penalty phase jury to "be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed," J.App. 35; RT 4836; and directed: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." *Ibid*. But the jurors were not instructed that the weighing process was a substitute for the determination of whether, in their personal judgment, the death penalty was the appropriate punishment. Nor did the court inform the jurors that they were not compelled to impose the death penalty unless—upon conducting that weighing process—they deemed death, rather than life imprisonment without parole, to be the appropriate penalty. *People v. Boyde*, 46 Cal.3d 212 (1988); see *id*.

252-254 (majority opinion), and compare 257-259, 265-266 (dissenting opinion).

During the voir dire examination, the prosecutor repeatedly sought assurances from the prospective jurors that they would follow and apply the law as he understood it. J.App. 8 (Juror Breeding), 9-10 (Jury Foreman Armas), 13 (Juror Warne), 14 (Juror Hart), 19 (Juror Ashe). He questioned them variously about "the strict structure" of the "list" of factors "that you are to look at in deciding whether the death penalty should be imposed," *Id.* at 9, and explained that "what you do is you take that evidence plug it into the factors, and if you find that the ones that make the crime worse, those that aggravate it, outweigh the others, you shall return a death penalty." *Id.* at 17. Throughout the lengthy voir dire process the prosecutor told the jury to "resolve the question of penalty solely on the basis of whether aggravation outweighed mitigation or mitigation outweighed aggravation, without regard to the juror's own personal view of whether death or life without possibility of parole was the appropriate punishment under all the circumstances." *Boyde, supra*, 46 Cal.3d at 260 (Arguelles, J., dissenting).

Thus the prosecutor variously described the test as "whether, when you weigh the two, do the aggravating factors outweigh the mitigating factors or vice versa. [¶] If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." J.App. 20-21. Reminding the jurors of the lengthy voir dire process and that they had taken an oath "to follow the law as it is given to you by the Court," he directed them "to go through each and every one of those factors and decide . . . is this the kind of case as I am guided by these factors that warrants the death penalty?" *Id.* at 24.

In his rebuttal closing argument, the prosecutor again focused the jury's attention on "those eleven factors that are on the board that have to guide you, direct you, and be the basis upon which you make the decision." *Id.* at 28. He told the the jury: "You are deciding the just punishment according to law. You're not deciding whether I like him, don't like him, whether it's my decision to impose the death penalty. [¶] You have been given very clear guidelines, eleven of them, to direct your decision in this case. You have taken an oath that you would be willing to do that, and that's what you have to do." RT 4823. In completing his rebuttal argument, the prosecutor reiterated his understanding of the "process of weighing": "[T]he instruction is specific on it and I don't know if Defense Counsel is inviting you not to do this, that he is inviting you to make a decision independent of what the instruction is; but, this is what your obligation is, if you conclude the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death." J.App. 30; RT 4825-4826.

The jury thereafter returned its verdict fixing petitioner's punishment as death. The trial judge denied petitioner's statutory motion to reduce the penalty to life imprisonment without the possibility of parole and entered a judgment of death against him on April 20, 1982. RT 4903-4908.

On petitioner's automatic appeal to the Supreme Court of California, a majority of four justices (out of seven) upheld petitioner's death sentence. Speaking for the majority, Justice Panelli concluded "the jury was adequately informed that the manner in which it weighed mitigating versus aggravating circumstances was in its sole discretion and that it thereby determined whether death was appropriate." *Boyde, supra*, 46 Cal.3d at 255.

The majority thus rejected petitioner's contention that the instructions misdirected the jury concerning the process of weighing aggravating and mitigating factors which the prosecutor had fully exploited during argument. Moreover, the majority opined that the three dissenting justices' reliance on the prosecutor's misleading statements "before trial to unsworn jurors during individual voir dire," to establish that the jury was misinformed of the nature and breadth of its sentencing task, reflected a "novel view, unsupported by any cited authority" 46 Cal. 3d at 254 Cf. *id.*, 259-262, 265-266 (Arguelles, J., concurring and dissenting).

The majority opinion of the Supreme Court of California acknowledged that additional errors occurred during the penalty phase of petitioner's trial, to wit:

1. The trial court erred in admitting most of the prosecutor's evidence concerning petitioner's commitment to the California Youth Authority, his poor performance on parole, his untruthfulness, his possession of stolen property, his possession of marijuana in jail, his assault on Ms. Deitzman and Ms. Smith, and his robbery of Edward Hall. 46 Cal.3d at 249-250.

2. The prosecutor erroneously argued to the jury lack of mitigation should be considered as additional aggravation. *Id.* at 255.

The majority further concluded, however, that each of these errors was nonprejudicial and therefore affirmed the judgment of death, although it did not explicitly address whether the combined effect of all the penalty phase errors prejudiced petitioner. *Id.* at 256.

SUMMARY OF ARGUMENT

I

Among the most well-established principles of this Court's capital sentencing jurisprudence is that the

Eighth and Fourteenth Amendments "require that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); accord *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982). Nor can any doubt remain that "evidence extraneous to the crime itself is deemed relevant" for purposes of assessing the defendant's "moral blameworthiness." *South Carolina v. Gathers*, 490 U.S. ___, ___, 104 L.Ed.2d 876, 887 (1989) (O'Connor, J., dissenting); see *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

Petitioner's jury was instructed to weigh a list of 11 exclusive factors to determine the penalty. J.App. 33-34. Of these, the final "catch-all" factor (k) was the only portion of the instructions that "even arguably applies to the nonstatutory mitigating factors" about petitioner's background or character, *California v. Brown*, 479 U.S. 538, 546 (1987) (O'Connor, J., concurring); but as it formerly read, the factor (k) instruction permitted the jurors to consider "any other circumstances" only if it "*extenuates the gravity of the crime* even though it is not a legal excuse for the crime." (Emphasis added.) The instructions therefore precluded the jury from giving mitigating effect to evidence of petitioner's background and character not immediately related to the crime.

The prosecutor assiduously reinforced this preclusive effect by urging that none of petitioner's mitigating evidence fit within the list of statutory circumstances and that petitioner's deprived background and good character did not extenuate the gravity of his crime. J.App. 22-23, 29. While defense counsel asked the jury to consider such evidence notwithstanding, this argument had no chance of prevailing because defense counsel's argument "cannot

substitute for [correct] instructions by the court.” *Taylor v. Kentucky*, 436 U.S. 478, 488-489 (1978). This situation is comparable to that in *Penry v. Lynaugh*, 492 U.S. ____ (1989), in which mitigating evidence was presented and argued at length by defense counsel; nevertheless, limiting instructions precluded the jury from giving effect to it. See *Skipper v. South Carolina*, 476 U.S. 1 (1986).

In petitioner’s case the consequences of curtailing the jury’s power to consider mitigating circumstances were profound. He presented extensive evidence of his poverty-stricken childhood and psychological problems; friends and family members also testified to his generosity and kindness. But none of petitioner’s evidence about his background and character fit any of the enumerated mitigating circumstances from factors (a) through (j) in the exclusive list on which the jury was instructed, and none of it fit within the “catch-all” factor (k) instruction because such evidence could not in any logical sense be viewed as having “extenuated the gravity of the crime.” Yet those mitigating circumstances did reveal a person of worth, and so provided a reason “why a death sentence . . . should not be imposed,” *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (plurality opinion). Exclusion of such evidence from the jury’s consideration thus unacceptably “risks erroneous imposition of the death sentence.” *Mills v. Maryland*, ____ U.S. ____, 100 L.Ed.2d 384, 394 (1988).

II

Petitioner’s jury was also instructed that “[i]f you conclude that aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.” J.App. 35. By thus reducing the determination of petitioner’s death sentence to a mechanistic weighing process, the instruction as it formerly read violated “[t]he

constitutional mandate of individualized determinations in capital-sentencing proceedings” required by the Eighth and Fourteenth Amendments. *Sumner v. Shuman*, 483 U.S. ____, 97 L.Ed.2d 56, 65 (1987). This Court has repeatedly recognized that the constitutional bottom line regarding the sentencer’s choice of penalty is whether “death is the appropriate sentence” under all of the evidence. *Penry v. Lynaugh*, *supra*, 492 U.S. at ____, 57 U.S.L.W. at 4962. In this way, “the sentence imposed should reflect a reasoned *moral* response to the defendant’s background, character, and crime.” *Franklin v. Lynaugh*, 487 U.S. ____, ____, 101 L.Ed.2d 155, 172 (1988) (concurring opinion) (emphasis in original). The “reasoned moral response” contemplated by the Eighth Amendment does not rest solely upon the sentencer’s weighing of aggravating and mitigating circumstances against each other.

One of the matters precluded from consideration under the mandatory instruction given in petitioner’s case is an assessment of the absolute weight of the aggravating circumstances—that is, how strongly the aggravating circumstances call for death as the appropriate sentence. When only the relative weight is considered, there is an unacceptable risk that death will be imposed even though the aggravating circumstances are themselves “insufficiently weighty to support the ultimate sentence.” *Barclay v. Florida*, 463 U.S. 939, 964 (1983) (Stevens, J., joined by Powell, J., concurring). The second matter precluded from consideration by California’s former mandatory sentencing instruction is the judgment, based on the totality of the aggravating and mitigating evidence, of whether death is the appropriate sentence. The Court has long made clear that the capital sentencer always retains the discretion to decide that death is not the “just or wise”

sentence, "upon a view of the whole evidence." *Winston v. United States*, 172 U.S. 303, 313 (1899), cited in *Woodson v. North Carolina*, 428 U.S. 280, 296 (1976). The prosecutor in this case, however, emphasized during the voir dire examination of petitioner's jury, that jurors might be compelled to vote for the death penalty even though, for example, "I don't think this crime deserves the death penalty . . ." J.App. 18; and his penalty phase argument repeatedly referred to the rigid framework of the law reflected in the list of 11 factors given the jurors which he maintained required the death penalty, explaining, "If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." J.App. 21.

Accordingly, neither the instructions nor the argument of counsel accurately or clearly informed the jury of the duties it must perform in order to come to an individualized sentencing decision in petitioner's case. Because California's former mandatory instruction requiring a verdict of death whenever aggravating circumstances outweigh mitigating circumstances precluded the jury from making a reasoned moral judgment that the penalty of death was appropriate for petitioner, it violated the Eighth and Fourteenth Amendments.

ARGUMENT

As the California Supreme Court acknowledged in its decision below, petitioner's jury was instructed pursuant to the former, "unadorned" versions of California Jury Instructions—Criminal (CALJIC) Nos. 8.84.1 and 8.84.2. Petitioner argued that the first of these instructions precluded the jury's consideration of mitigating evidence about his character and background not immediately related to the crime, and that the second

prevented the jury from determining whether death was the appropriate punishment under all the circumstances of his case by confining its sentencing inquiry to a mere mechanical weighing of aggravating factors against mitigating factors. After petitioner's trial, the California Supreme Court directed that both instructions be revised to cure constitutional defects in each—the first, "factor (k)" instruction (referring to subdivision (k) of Cal. Penal Code § 190.3), in *People v. Easley*, 34 Cal.3d 858, 878, n. 10 (1983); the second, the weighing of aggravating/mitigating circumstances instruction, in *People v. Brown*, 40 Cal.3d 512, 544, n. 17 (1985), rev'd on other grounds in *California v. Brown*, 479 U.S. 538 (1987). (See Appendices A and B for former and present forms of both instructions).

Despite the intervening correction of these instructions, a majority of the California Supreme Court rejected petitioner's claim that the "unadorned" instruction on factor (k) "may have misled the jury into thinking it could not consider evidence relating to his background and character," *People v. Boyde*, 46 Cal.3d 212, 251 (1988). The court also ruled against petitioner's contention that the instruction to impose death if the aggravating circumstances outweighed the mitigating circumstances left the jury without "an adequate basis on which to determine whether the death sentence is the appropriate sanction," *Sumner v. Shuman*, 483 U.S. —, —, 97 L.Ed.2d 56, 71 (1987), in his case based on a "reasoned moral response to [petitioner's] background, character, and crime." *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis in original). As petitioner now explains, both of these holdings affront the Eighth and Fourteenth Amendment requirement "of heightened reliability in death-penalty determinations through indi-

vidualized-sentencing procedures." *Shuman, supra*, 483 U.S. at ___, 97 L.Ed.2d at 72. Because neither conclusion can withstand constitutional analysis, petitioner's sentence must be set aside.

I

THE FORMER FACTOR (K) INSTRUCTION LIMITED THE SENTENCER'S CONSIDERATION OF MITIGATING EVIDENCE TO FACTORS EXTENUATING THE CRIME, THEREBY PRECLUDING THE JURY FROM GIVING MITIGATING EFFECT TO EVIDENCE OF PETITIONER'S BACKGROUND AND CHARACTER NOT IMMEDIATELY RELATED TO THE CIRCUMSTANCES OF THE CRIME IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

This Court has consistently required that a capital sentencer be allowed to consider a wide range of information concerning the defendant's background. As emphasized by a plurality in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Eighth and Fourteenth Amendments "require that the sentencer . . . not be precluded from considering as a *mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (emphasis in original). Accord *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). In a variety of contexts, the Court has refused to tolerate restrictions on the "sentencer's consideration of all mitigating evidence." *Mills v. Maryland*, 486 U.S. ___, ___, 100 L.Ed.2d 384, 394 (1988).

Thus in *Skipper*, when South Carolina argued that the defendant's evidence of his good behavior in jail could not properly be considered a mitigating circumstance because it postdated and was unrelated to the crime, the Court rejected this restrictive concept and held that character or background evidence is to be considered "mitigating" so long as it "might serve 'as a basis for a

sentence less than death.'" 476 U.S. at 4-5 (quoting *Lockett v. Ohio, supra*, 438 U.S. at 604). Accord, *Sumner v. Shuman, supra*, 486 U.S. at ___, 97 L.Ed.2d at 66, n. 5. In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a unanimous Court made plain its commitment to this principle by holding that the sentencing instructions and findings in a Florida case had unconstitutionally precluded consideration of such non-crime-related factors as evidence

" . . . that as a child petitioner had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers." *Id.* at 397.

Subsequent cases reflect no erosion of the broad principle that all constitutionally relevant mitigating evidence must be given consideration and that non-crime-related circumstances are included within the scope of "relevant" factors. For example, the Court in *Penry v. Lynaugh*, 492 U.S. ___, 57 U.S.L.W. 4958 (June 26, 1989), while dividing on other issues, spoke with a single voice on this one. See *South Carolina v. Gathers*, 490 U.S. ___, ___, 104 L.Ed.2d 876, 887 (1989) (O'Connor J., joined by Rehnquist, C.J., and Kennedy, J., dissenting) ("[e]vidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so, . . . [because] it [i]s relevant to the jury's assessment of the defendant himself and his moral blameworthiness");⁴ *Penry, supra*, 57 U.S.L.W. at

⁴ The evidence "extraneous to the crime" in *Gathers* was described by Justice O'Connor as follows:

"[T]he sentencing jury heard testimony from respondent's

4972-4973 (Scalia, J., joined by Rehnquist, C.J., White and Kennedy, JJ., dissenting) (noting that although a State may “‘structur[e] or giv[e] shape to the jury’s consideration of . . . mitigating factors,’ . . . it may not affirmatively preclude a sentencer from considering mitigating evidence presented by a defendant [citing *Hitchcock* and *Skipper*]”). This settled rule was violated by the instructions in petitioner’s case.

Petitioner’s jury was instructed in conformity with the factors enumerated in subdivisions (a) through (k) of Cal. Penal Code § 190.3 (as listed in former CALJIC 8.84.1; see Appendix A). J.App. 33-34.⁵ Nine of these 11 factors—whether aggravating, mitigating or neutral—bore exclusively upon the immediate circumstances of the crime itself. Cal. Pen. Code § 190.3, subds. (a), (d), (e), (f), (g), (h), (i), (j), (k). This includes all of the factors that can only be mitigating—(d), (e), (f), (g), (h), (j) and (k)⁶ and one (factor (i), the defendant’s age at the time of the crime) that can be aggravating, mitigating or neutral.⁷ Factors

mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. [Citation omitted.] Gathers’ sixth grade teacher testified that he was a quiet and affectionate child but that he was not given sufficient guidance and discipline at home.” 104 L.Ed.2d at 887.

⁵ The California Supreme Court has interpreted this statutory list as exclusive, precluding evidence not probative of any specifically listed factor. *People v. Boyd*, 38 Cal.3d 762, 773-774, (1985). The court has approved the practice of reading each of the factors to the jury on the ground that it is for the jury to determine which factors are relevant or applicable in the individual case. *People v. Hernandez*, 47 Cal.3d 315, 364 (1988).

⁶ See *People v. Hamilton*, 48 Cal.3d 1142, 1184 (1989).

⁷ See *People v. Lucky*, 45 Cal.3d 259, 302 (1988). As the court subsequently explained, “mere chronological age by itself is not relevant to the appropriate penalty and is neither aggravating nor mitigating. *People v. Bean*, 46 Cal.3d 919, 952 (1988).

(b) and (c) were vehicles for evidence in aggravation not related to the immediate crime; the prosecution showed both prior criminal activity involving force or violence (factor (b)) and prior felony convictions (factor (c)). Thus there was simply no category of *mitigation* that the jury was permitted to consider that encompassed *non-crime*-related factors.

The remaining “catch-all” factor (k), as it formerly read, did not cure this deficiency. Factor (k), J.App. 34, directed the jury’s attention to “[a]ny other circumstance which *extenuates the gravity of the crime* even though it is not a legal excuse *for the crime*.” (Emphasis added.) There was accordingly no vehicle under the plain language of former CALJIC 8.84.1 instruction as given in petitioner’s case for the jury to “consider and give effect to,” *Penry v. Lynaugh*, *supra*, 492 U.S. at ___, 57 U.S.L.W. at 4965, petitioner’s non-crime-related mitigating evidence “in rendering its sentencing decision.” *Ibid*.

Not only would “the specific language challenged,” *California v. Brown*, 479 U.S. 538, 541 (1987), quoting *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985), have been interpreted to preclude the jury’s consideration of mitigating circumstances not immediately related to the crime, but the context within which the factor (k) instruction was given reinforced that meaning. Petitioner’s jury was charged to consider a list of factors, from Cal. Penal Code § 190.3(d) through (j), which repeatedly and consistently referred to “the time of the crime,” “the offense,” the “homicidal act,” and the time that “defendant acted.” Given that *each* specific *mitigating* factor was expressly focused on the crime itself, any reasonable juror would have concluded that the final catch-all category on that exclusive list—factor (k)’s “any other circumstance which extenuates the gravity of the crime,” J.App. 34—had to be

similarly *related to the crime*. With no instruction anywhere telling the jury that petitioner's character and background evidence which was not related to the crime could be considered in mitigation, the jury would not have understood that it could.

And the prosecutor assiduously reiterated this limitation throughout the trial. During voir dire he emphasized that the list of aggravating and mitigating factors which the jurors would be given in the instructions defined and limited the way in which the sentencing-related evidence could be considered.⁸ Thus, he explained that the list represented "the way the law is set up now, [and] it is a very strict structure." J.App. 9. "[W]hat they have done is created a lot of things to look at, about nine or 10 factors. And, essentially what you do is you take that evidence [and] plug it into the factors." *Id.* at 17. Thereafter, in his penalty-phase summation, the prosecutor reminded the jury of the list of factors our society "has given . . . to decide [penalty] upon." *Id.* at 28. He pointed out, "[y]ou have been given very clear guidelines, eleven of them, to direct your decision in this case." RT 4823:17-18.

With the jury committed to following these guidelines, the prosecutor proceeded to argue at the penalty phase of trial that petitioner's mitigating evidence was wholly irrelevant to the specific mitigating factors in the list and

⁸ This Court has recognized that the prosecutor's closing argument must be considered in relation to the jury's probable understanding of the instructions. See, e.g., *California v. Brown*, 479 U.S. at 546 (O'Connor, J., concurring). The Eleventh Circuit has, in a similar context, concluded that the prosecutor's comments during voir dire are also part of the context within which a reviewing court must examine the jury's probable understanding of instructions. See *Mann v. Dugger*, 817 F.2d 1471, 1483 (11th Cir. 1987), cert. denied, ___ U.S. ___, 103 L.Ed.2d 821 (1989).

even to the catch-all factor (k). Thus, after reading the factor (k) language to the jury, and observing that "we've heard a lot from his family, from psychologists as to why [petitioner] is the way he is now," the prosecutor asserted, "you are asked to consider whether what you have heard about this Defendant extenuates in any way the gravity of this crime, and I would suggest it does not." RT 4776-4777; J.App. 22-23. And later, he again argued in relation to factor (k), "If you look and you read what it says about extenuation, it says, 'To lessen the seriousness of a crime as by giving an excuse.' Nothing I have heard lessens the seriousness of this crime, nothing." RT 4824; J.App. 29. The California Supreme Court construed this argument as simply urging the jury to find that the mitigating evidence was insufficient to outweigh the aggravating evidence.⁹ However, the prosecutor plainly was not addressing simply the relative weight of the evidence; he was arguing instead that none of petitioner's mitigating evidence fit within the factors listed in the instructions—not even the catch-all "any other factor"—because none of petitioner's evidence had anything to do with lessening the seriousness of the crime.¹⁰

Arrayed against the prosecutor's argument was the bland suggestion of defense counsel that petitioner's evi-

⁹ "Although the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence should not be considered." *People v. Boyde*, 46 Cal.3d at 251.

¹⁰ See, e.g., the following portions of the prosecutor's summation: "You can speculate for hours as to exactly why this man is the way he is . . . [¶] '[N]othing that I have heard there relieves or extenuates in any way the seriousness of this particular crime.'" RT 4777; J.App. 23.

"Nor, I ask you, does this in any way relieve him or does that in any way suggest that this crime is less serious or that the gravity of the crime is any less; I don't think so." RT 4778; J.App. 24.

dence should be considered in mitigation even though it was not related to, and did not lessen the seriousness of, the crime itself. J.App. 26-27. However, in the overall context of the trial, this argument stood no chance of dissuading the jury from adopting the prosecutor's frame of reference, which confirmed—and was actually confirmed by—the instructions. *Penry v. Lynaugh*, *supra*, 492 U.S. at ___, 57 U.S.L.W. at 4964. Particularly in a context like this, the arguments of defense counsel “cannot substitute for [correct] instructions by the court.” *Taylor v. Kentucky*, 436 U.S. 478, 488-489 (1978). Accord, *Carter v. Kentucky*, 450 U.S. 288, 304 (1981).

While the instructions and the prosecutor's arguments thus *would* have led the jury to understand that it could not consider as a mitigating factor any evidence that was unrelated to the crime, petitioner needs not show this much to prevail. He is required only to show that “[his] interpretation of the sentencing process is one a reasonable juror *could* have drawn from the instructions given by the trial court.” *Mills v. Maryland*, ___ U.S. ___, ___, 100 L.Ed.2d 384, 394 (1988) (emphasis supplied). Accord *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979); and see *Andres v. United States*, 333 U.S. 740, 752 (1948) (where “reasonable men might derive a meaning from the instructions given other than the proper meaning[,] . . . [i]n death cases [such] doubts . . . should be resolved in favor of the accused”). Within the context of petitioner's trial, a reasonable juror plainly “could” have interpreted the instructions as precluding consideration of non-crime-related mitigating evidence.¹¹

¹¹ In fact, there is evidence here that other presumably “reasonable men” and women did “derive” an improper meaning from the former instruction. Amicus California Appellate Project has pointed

Observing that petitioner's evidence at the penalty phase consisted of background and character evidence that was unrelated to the crime, the California Supreme Court implied that any instructional deficiency was cured by a separate portion of the charge that told the jury to consider “all of the evidence which has been received during any part of the trial of this case.” *People v. Boyde*, 46 Cal.3d at 251. This reasoning was further supported by the court's view that the sheer volume of mitigating evidence and argument about it by defense counsel would have led the jury to consider the evidence: “[I]t is inconceivable the jury would have believed that, though it was permitted to hear defendant's background and character evidence, and his attorney's lengthy argument concerning that evidence, it could not consider that evidence.” *Id.* at 251. This attempt to save the defective instructions fails on several counts.

First, this Court has recognized that a broad description of the evidence to be considered cannot cure a specific directive to consider that evidence only in relation to certain issues (such as whether it “extenuates the gravity of the crime”). See *Lockett v. Ohio*, *supra*, 438 U.S. at 608 (citing *State v. Bayless*, 48 Ohio St.2d 73, 86-87, 357 N.E.2d 1035, 1045-1046 (1976) (reviewing an instruction in an Ohio capital case which contained the same broad description of the evidence to be considered as here). Telling jurors to consider “all of the evidence” received during the entire trial does not countermand specific instructions defining the sole issues on which that evi-

out that prior to the California Supreme Court's decision in *People v. Easley*, 34 Cal.3d 858 (1983), it was the widespread practice of prosecutors and judges in California to interpret former factor (k) as precluding consideration of mitigating evidence unrelated to the crime. Brief of Amicus Curiae at 12-17.

dence is to be considered. Nor does it apprise jurors that factors beyond the scope of those issues—such as circumstances which do not extenuate the crime's gravity—nevertheless “might serve ‘as a basis for a sentence less than death.’” *Skipper v. South Carolina*, *supra*, 476 U.S. at 5 (citing *Lockett* at 604).

Second, even if reasonable jurors could have understood the instruction about considering all sources of evidence as permitting them to give effect to mitigating circumstances unrelated to the crime, so construed, that instruction would have been directly in conflict with the explicit list of factors from (a) through (k) which the court read the jury in the very next breath. J.App.33. It would have been inconsistent, moreover, with the whole pattern of instructions concerning aggravating and mitigating circumstances which plainly limited the jury's consideration of aggravating evidence to the specifically-listed aggravating circumstances. See RT 4836:5-9. If the instruction to consider “all of the evidence” were construed to allow the consideration of *mitigating* factors *not* specified among the listed mitigating factors, the instruction would necessarily be construed as allowing untethered consideration by the jury of *aggravating* factors as well—a form of open-ended application which the California Supreme Court has held erroneous based on the exclusive nature of the list of statutory aggravating circumstances.¹² Furthermore, jurors told to consider only carefully defined circumstances on the one hand, and everything on the other, would necessarily (although understandably) be confused. At best, therefore, the California Supreme Court's interpretation of the directive to consider “all of the evidence” would produce a classic

¹² *People v. Boyd*, 38 Cal.3d 762, 772-775 (1985).

instructional conflict as to which it would be impossible to “conclude that the jury followed the [proper] . . . instruction” rather than the improper one. *Cabana v. Bullock*, 474 U.S. 376, 383, n. 2 (1986). See also *Francis v. Franklin*, 471 U.S. 307, 322 (1985) (“Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity”).

Third, this situation is comparable to *Penry v. Lynaugh*, *supra*, in which mitigating evidence was presented and argued at length by defense counsel but the jury was nonetheless effectively precluded from giving effect to it by a limiting instruction. Here, as in *Penry*, the jury was effectively prevented from considering petitioner's proffered mitigation bearing on “compassionate or mitigating factors stemming from the diverse frailties of humankind,” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion), and “relevant mitigating circumstances pertaining to the offense and a range of factors about [petitioner] . . . as an individual,” *Sumner v. Shuman*, 483 U.S. at ___, 97 L.Ed.2d at 64.

In the setting of petitioner's case, this curtailment of the jury's power to consider mitigating circumstances had profound consequences. At the penalty phase of his trial, petitioner presented considerable mitigating evidence concerning his character and background in order to establish that, notwithstanding the gravity of his crime, his life should be spared. Testimony from his mother, two sisters, stepfather, ex-girlfriend and her mother, and his wife related the impoverished and destructive circumstances of petitioner's upbringing and the difficulties he experienced as a youth and thereafter as an adult. Raised

by his mother alone (she worked first as a farm laborer and afterward as a domestic) and fatherless—the evidence suggested that petitioner was obsessed with not knowing the father who had abandoned him—Richard Boyde had health problems virtually from birth. As a very young child, he developed psychological difficulties that adversely affected his performance in school and caused him to come into contact with the authorities. Efforts to obtain counseling through the school system were unavailing. According to a court-appointed psychologist, for much of petitioner's life he had suffered depression and feelings of low self-esteem and social inadequacy. Notwithstanding the harsh and embittered contours of his life, petitioner's former girlfriend and sister described him as "a giving person, good with children and good to them," *People v. Boyde, supra*, 46 Cal.3d at 249. Although he looked for work diligently after release from prison, he was unable to find it.

These mitigating circumstances could not have been considered and given mitigating effect, see *Penry v. Lynaugh, supra*, under the instructions in petitioner's case. In the first place, all of the mitigating circumstances established by petitioner's evidence—his impoverished and deprived childhood (in which he lacked physical and emotional sustenance); his inadequacies as a school student; his difficulties in making a satisfactory adjustment on a social, intellectual, and emotional level; and, in the face of these obstacles, his strength of character (shown by his efforts to be generous, to be kind to children, and to be a good husband, notwithstanding the difficulties of his daily life)—are wholly irrelevant to, and thus could not have been considered under, any of the specifically listed mitigating circumstances on which his jury was instructed. None of petitioner's mitigating circumstances

revealed that he had an "extreme mental or emotional disturbance" at the time of the offense, Cal. Penal Code § 190.3(d); that the victim in any way participated voluntarily in the offense, § 190.3(e); that the offense was committed on the basis of a reasonable sense of moral justification, § 190.3(f); that petitioner acted under "extreme duress" or the "substantial domination of another," § 190.3(g); that his mental or emotional disabilities impaired his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" at the time of the offense, § 190.3(h); that he was too young or too old at the time of the offense to spare his life, § 190.2(i); or that his participation in the offense was "relatively minor," § 190.3(j). The mitigating circumstances established by Mr. Boyde's evidence simply had nothing to do with these statutorily-enumerated factors.

Similarly, petitioner's mitigating evidence could not be considered under catch-all factor (k) because none of it, in any logical sense, could have "extenuated the gravity of the crime." Indeed, the mitigating circumstances were in no way connected to the crime or to his mental state at the time of its commission. These mitigating circumstances, rather, had to do with the person Richard Boyde, an individual, who grew up in poverty and extreme hardship, who lived with emotional and intellectual deficits which made everyday-life difficult, and who struggled against these odds to relate in positive ways with other human beings. Going solely to petitioner's character, these factors shed no light on why he committed the particular crime for which he was on trial; this mitigating evidence did not at all "suggest that [his] . . . crime is less serious or that the gravity of the crime is any less," as the prosecutor pointedly told the jury in closing argument. RT 4778; J.App. 24. None of these mitigating circumstances, in short, extenuated the gravity of the crime.

These mitigating circumstances did, however, provide a reason "why a death sentence . . . should not be imposed," *Jurek v. Texas*, 428 U.S. 262, 271 (plurality opinion). They revealed a person of worth, who struggled against more hardships than most other people have to face, who sometimes overcame them and who sometimes did not. They revealed a person in whom the human spirit was alive and whose faltering quest for human dignity called for compassionate understanding rather than unforgiving retribution. Petitioner's mitigating circumstances were in these respects indistinguishable from the non-crime-related mitigating circumstances in *Hitchcock*, *Skipper*, and *Penry*. Their exclusion from the jury's sentencing deliberations accordingly "risks erroneous imposition of the death sentence, in plain violation of *Lockett*," *Mills v. Maryland*, 100 L.Ed.2d at 394 (citing *Eddings v. Oklahoma*, 455 U.S. at 117 (O'Connor, J., concurring)). This risk is one that the Court has never found tolerable in a death case. It should not be tolerated here.

II

THE FORMER INSTRUCTION REQUIRING A VERDICT OF DEATH WHENEVER AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES PRECLUDED THE JURY FROM MAKING A REASONED MORAL JUDGMENT REGARDING THE APPROPRIATENESS OF THE DEATH PENALTY FOR PETITIONER, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Petitioner's jury was instructed that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." J.App. 35. This instruction reduced the determination of petitioner's sentence to a mechanistic weighing process that foreclosed the "individualized assessment of the

appropriateness of the death penalty" required by the Eighth and Fourteenth Amendments, *Penry v. Lynaugh*, *supra*, 492 U.S. at ___, 57 U.S.L.W. at 4962.

A. The Constitutional Requirement Of An Individualized Determination That Death Is The Appropriate Sanction In Each Particular Case Is Violated By A Procedure That Makes The Sentence Depend Solely On Whether Aggravating Circumstances Outweigh Mitigating Circumstances

The constitutional prohibition of mandatory capital sentencing in 1976 was premised on the respect for human dignity embodied in the Eighth Amendment, which requires recognition of the uniqueness of each individual case for the purpose of determining the appropriateness of the extreme punishment of death. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). Since that time, the "constitutional mandate of individualized determinations in capital-sentencing proceedings" has become a central feature of this Court's Eighth Amendment jurisprudence. *Sumner v. Shuman*, *supra*, 483 U.S. at ___, 97 L.Ed.2d at 65.

Lockett v. Ohio exemplifies that principle but does not exhaust it. See, e.g., *Mills v. Maryland*, *supra*, 100 L.Ed.2d at 394; *Penry v. Lynaugh*, *supra*. In order "to determine whether the death sentence is the appropriate sanction in any particular case," *Shuman*, *supra*, 97 L.Ed.2d at 67; *Woodson*, *supra*, at 305, a capital sentencer must be permitted to give "significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense" *Ibid*. See also *Lockett*, 438 U.S. at 604; *Skipper v. South Carolina*, 476 U.S. at 4-5; *Shuman*, at 64-70; *Franklin v. Lynaugh*, 487 U.S. ___, ___, 101 L.Ed.2d 155, 172-173 (1988) (O'Connor, J., joined by Blackmun, J.,

concurring). The sentencing decision must "rest on a far-reaching inquiry into countless facts and circumstances," *Zant v. Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring), and the sentencer must be "free to consider a myriad of factors . . .," *California v. Ramos*, 463 U.S. 992, 1008 (1983). The sentencer must be allowed to "give effect to" its consideration of this myriad of factors by imposing whichever sentence it views as "the appropriate punishment." *Franklin v. Lynaugh*, 101 L.Ed.2d at 172-173 (O'Connor, J., joined by Blackmun, J., concurring).

Thus, this Court has repeatedly recognized that the constitutional bottom line regarding the sentencer's choice of penalty is whether "death is the appropriate sentence" under all of the evidence. *Penry v. Lynaugh*, 57 U.S.L.W. at 4962.¹³ In this way, "the sentence imposed should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Franklin v. Lynaugh*, 101 L.Ed.2d at 172 (concurring opinion) (quoting *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis in original)).

¹³ Accord, *Woodson*, 428 U.S. at 305 (plurality opinion of Stewart, Powell, Stevens, JJ.) (discussing the constitutional need for reliability in "the determination that death is the appropriate punishment in a specific case"); see also *McCleskey v. Kemp*, 481 U.S. 279, 310, n. 32 (1987) (the purpose of a sentencer's broad discretion is to decide whether or not "death is 'the proper penalty' in a given case," (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)); *Booth v. Maryland*, 482 U.S. —, 96 L.Ed.2d 440, 451 (1987) (sentencer's "constitutionally required task [is] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime"); *Sumner v. Shuman*, 97 L.Ed.2d at 67 (capital murder statute provides inadequate basis "to determine whether the death sentence is the appropriate sanction in any particular case").

The instruction in petitioner's penalty trial required the jury to impose death if it found that the aggravating circumstances outweighed the mitigating circumstances. The determination that aggravation outweighed mitigation was thus substituted for the jury's "reasoned moral response" to Mr. Boyde's background, character, and crime. The constitutional problem with this is that the "reasoned moral response" contemplated by the Eighth Amendment does not rest solely upon the sentencer's weighing of aggravating and mitigating circumstances against each other. The making of a reasoned moral response certainly takes into account the balance of aggravating and mitigating circumstances, but it must take into account *more* than this if the sentencing decision is to be individualized. It is the mandatory capital sentencing instruction's preclusion of the sentencer's consideration of these other matters which is its constitutional flaw.

One of the matters precluded from consideration is an assessment of the absolute weight of the aggravating circumstances. In *Sumner v. Shuman*, *supra*, the Court recognized that every aggravating circumstance is not of equal weight, and further, that even the same statutory aggravating circumstance will have different weight in different cases. Focusing on a particular aggravating circumstance in *Shuman*, "[p]ast convictions of other criminal offenses," the Court explained that "[this circumstance] can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder, but the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense." 97 L.Ed.2d at 69.

Certainly the same can be said as to any aggravating circumstance or collection of aggravating circumstances:

their absolute aggravating weight—how strongly they will call for the death sentence as the appropriate sentence—will vary from case to case. An individual's moral culpability cannot, therefore, be measured simply by reference to the fact that there are aggravating circumstances associated with his background, character, and crime. The presence of particular aggravating circumstances merely establishes the murder as a particular category of murder, but "individual culpability is not always measured by the category of the crime committed." *Roberts (Stanislaus) v. Louisiana*, 484 U.S. 325, 333 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting)). To make a "reasoned moral response to the defendant's background, character, and crime," *Franklin v. Lynaugh*, *supra*, 487 U.S. at ____ (opinion concurring in judgment), the sentencer must undertake an assessment of whether the absolute weight of the aggravating circumstances were simply insufficient in themselves to warrant a sentence of death.

If the capital sentencer is only allowed to assess the relative weight of the aggravating circumstances—i.e., their weight in relation to mitigating circumstances—as the jury was in petitioner's case, there is thus a risk that death will be imposed even though the aggravating circumstances are themselves "insufficiently weighty to support the ultimate sentence." *Barclay v. Florida*, 462 U.S. 939, 964 (1983) (Stevens, J., joined by Powell J., concurring). The fact that aggravating circumstances outweigh mitigating circumstances does not establish that the aggravating circumstances themselves are enough to warrant the imposition of death. A "reasoned moral" judgment should be made about this, but in petitioner's case the instruction foreclosed that assessment. The

direction to impose death if the aggravating circumstances outweighed the mitigating circumstances thus precluded the jury's consideration of the absolute weight of the aggravating evidence, and prevented the jury from finding those aggravating factors *weighty enough* to require the death penalty.

The second matter precluded from consideration by the mandatory sentencing instruction is the sentencer's judgment, based on the totality of the aggravating and mitigating evidence, of whether death is the appropriate sentence. The need for an overall judgment of the individual has long been recognized as the core of the constitutional objection to any mandatory capital sentencing scheme. In *Woodson*, for example, the plurality noted that the Court had for many years "commented upon our society's aversion to automatic death sentences," 428 U.S. at 296 (citing *Winston v. United States*, 172 U.S. 303 (1899)). And in *Winston* itself, the Court made clear that the capital sentencer always retains the discretion to decide that death is not the "just or wise" sentence in view of the totality of the evidence:

"The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of the opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of [the] opinion that it would not be just or wise to impose capital punishment." 172 U.S. at 313.

Thus, when Justice O'Connor wrote in *California v. Brown* that "the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime," 479 U.S. at 545 (emphasis in original), she was building upon a foundation

that was nearly a century old, on the basis of which the jury always retains the discretion to make a unique moral judgment on the whole of the evidence—to determine whether the death sentence for the particular individual before them is “just or wise.”¹⁴

When the instructions reduce the jury’s sentencing discretion, as in petitioner’s case, to consideration of whether aggravating circumstances outweigh mitigating circumstances, the ability to make this kind of moral judgment is put in jeopardy. Particularly where, as here, the instructions did not further explain to petitioner’s jurors in any respect that their “weighing” discretion must reflect their judgment, based on all the evidence, as to whether death or life was the “just or wise” sentence, there is a substantial risk that the jury’s weighing determination did not reflect a “reasoned moral response” to the whole of the evidence before them. Without such additional instruction, there is a very real possibility that the jury would perceive its sentencing role in the way that the dissenters in the California Supreme Court found Mr. Boyde’s jury had likely perceived its role:

“[I]t was not their responsibility to decide whether or not they personally believed that death was the appropriate punishment[;] . . . [they] were told that, under the law, they were only to decide whether aggravation outweighed mitigation without regard to their personal view as to the appropriate penalty. *People v. Boyde*, 46 Cal.3d at 265 (Arguelles, J., dissenting).

The damage which is thus done to a capital defendant’s right to an individualized sentencing decision by the kind

¹⁴ See also *Woodson*, *supra*, at 304 (necessary to consider both the offender and the offense to arrive at “a just and appropriate sentence”).

of mandatory death sentence instruction given in petitioner’s case can be readily illustrated. One can imagine a case—petitioner’s is an example—in which the aggravating circumstances, though substantial, do not demand the death penalty instead of a life sentence without parole. If asked whether, on the basis of the aggravating circumstances alone, the defendant should be sentenced to death, a juror might well say, “I am not certain. I feel divided about it. I am open to being persuaded. At the least, I will have to give it more thought.” The juror, in short, has not determined aggravation is sufficiently weighty as to compel a capital sentence. If, however, the jury were then instructed as petitioner’s jury was, and it found that the aggravating circumstances outweighed the mitigating circumstances—as obviously could happen—the death sentence would *have* to be imposed. The sentence would be imposed in this instance, however, without the sentencer having been required to determine, and without the sentencer having determined, whether the aggravating circumstances were themselves weighty enough to make death the appropriate sentence.

There is also, as discussed above, another way in which instructions that require a death verdict when aggravating factors outweigh mitigating factors would preclude a jury from expressing its reasoned moral response to the evidence. One can imagine a scenario where the defendant has presented mitigating evidence which, though not insubstantial, is not compelling. In such a case, a juror might say: “Considering the aggravating circumstances, I believe this to be a bad enough crime that I am seriously willing to consider the death penalty. Now, let’s see what the defendant has to say for himself.” Once again, the juror may find that aggravation outweighs mitigation and, under the court’s instructions, be required to vote for death. Yet the juror has never been required to decide whether, when all of the evidence is considered together, death is the just and appropriate punishment. Even though—when viewed through the narrow perspective of whether the aggravating circumstances outweighed the mitigating circumstances—the juror could be confident

that the aggravating circumstances were weightier, the juror's underlying equivocation about whether the aggravating circumstances alone compelled a death sentence could well have become a determination that death was *not* appropriate if the mitigating circumstances had been brought into the calculus. Only, however, if the instructions further told the jury to consider on the basis of all the evidence whether death was the *proper* sentence would the juror have been called upon to make this kind of judgment. But if the jury in this hypothetical case had been instructed in the same way as petitioner's jury, the juror would not have been directed to make *this* judgment.

That there is a fundamental difference between the mere weighing inquiry called for by petitioner's instructions and the inquiry into whether death is the proper sentence on the basis of the whole evidence has been further illustrated in the Amicus Curiae Brief filed by the California Appellate Project (CAP). Amicus examines a period of time in which capital sentencing juries in Alameda County were given instructions that allowed their separate consideration of whether aggravating outweighed mitigating circumstances *and* whether death was the appropriate sentence. CAP Amicus Brief, at 26-29. In 19 capital sentencing trials conducted in the Alameda County Superior Court from 1983-1988, the sentencing jury (1) was instructed that even if aggravation outweighed mitigation, it could return a sentence of life imprisonment without parole and (2) was given four alternative verdict forms that allowed the jury to specify both its choice of sentence and its determination as to whether aggravation outweighed mitigation. Of those 19 sentencing trials, the jury found that aggravation outweighed mitigation in 15 cases; nevertheless, in more than half of the 15 cases in which aggravation outweighed mitigation, the jury determined that life-without-parole, not death, was the appropriate punishment. These eight "LWOP" verdicts could not have occurred unless the jurors in those cases recognized that a finding that aggravation outweighs mitigation was substantially different from an

individualized determination that death is the appropriate punishment in the specific case before them.¹⁵

For these reasons, the mandatory death sentence instruction in petitioner's case precluded his sentencing jury from making a reasoned moral judgment about the appropriateness of death as punishment for him.

B. The Challenged Instruction Was Not Saved, But Rather Was Exacerbated, By The Prosecutor's Argument To The Jury

In reviewing petitioner's case, the California Supreme Court followed the practice it first articulated when it prospectively modified former CALJIC No. 8.84.2 in *People v. Brown*, 40 Cal.3d 512: "Each such prior case must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." *Id.* at 544 n.17. In petitioner's case, the court concluded that petitioner's jury was "adequately informed as to its discretion in determining whether death was the appropriate penalty," *People v. Boyde*, 46 Cal.3d 212, 253. The majority found that the prosecutor's argument to the jury provided sufficient assistance to the

¹⁵ In *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), the Court made clear that there is no one constitutionally-required procedure that states must use "to set up its capital sentencing scheme." Nothing in petitioner's argument suggests to the contrary. The California Supreme Court, of course, had no difficulty correcting the problem with the former mandatory instruction, *People v. Brown*, *supra*, 49 Cal.3d 512, and other jurisdictions have resolved related problems with similar ease. See, e.g., *State v. McDougall*, 301 S.E.2d 308, 327-328 (N.C. 1983) (responding to *Smith v. North Carolina*, 459 U.S. 1056 (1982), *opn. of Stevens, J.*, respecting denial of certiorari); *State v. Ramsey*, 524 A.2d 188 (N.J. 1987).

jurors to prevent their misguidance. In doing so, the court erred in two fundamental ways.

First, it ignored the teaching of *Taylor v. Kentucky*, 436 U.S. 478 (1978). While the arguments of counsel are deemed relevant to the determination of whether a reasonable juror could have understood a truly ambiguous instruction in a particular way, there is an important limitation on the relevance of counsel's argument when the instruction is clear on its face: "[A]rguments of counsel cannot substitute for [correct] instructions by the court." *Taylor, supra*, at 488-489; *Carter v. Kentucky*, 450 U.S. 288, 304 (1981). Thus, if the judge's charge is equally susceptible to several interpretations, the arguments of counsel which encourage one interpretation are relevant. However, if the instruction is *not* susceptible to a particular interpretation, the arguments of counsel in favor of that interpretation cannot save the charge. After all, if a contradictory instruction cannot cure a constitutionally defective jury charge, *Cabana v. Bullock, supra*, 474 U.S. at 383, n. 2; *Francis v. Franklin, supra*, 471 U.S. at 322, then a mere argument of counsel cannot cure it.

The California Supreme Court ignored this important principle. The instruction at issue here was straightforward: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a death sentence." J.App. 35; RT 4836. Without some further guidance from the trial judge, this instruction was not susceptible to an interpretation compatible with the Constitution.

Here there were no instructions explaining the process of deliberation other than the challenged instruction. The jury was not instructed that the weight assigned to the various aggravating and mitigating factors should reflect

its view of the appropriateness of death as a penalty. Nor was it instructed that the words "shall impose a death sentence" were to include the proviso "only if you believe death is the appropriate sentence."

In short, the trial court left the jury with one clear instruction telling it that a death sentence was required if aggravation outweighed mitigation. The jury would have seen its task of weighing aggravating and mitigating factors as no more than a factfinding function. In finding the facts in aggravation and mitigation, and in balancing the facts against each other, the jury would have carried out its task without ever considering whether the aggravating factors alone, or whether the evidence viewed as a whole, sufficiently called for the death penalty that it should be imposed.

In view of the clarity of the challenged instruction, and without further interpretive assistance from the court, even the best and most lucid argument by counsel could not under *Taylor* have saved the charge.

The second way in which the California Supreme Court erred in relying on the arguments of the prosecutor is equally telling. For even if a prosecutor's argument could in some cases cure a defective instruction, the arguments of the prosecutor at petitioner's penalty trial did not cure the problems with the instruction challenged here; rather, they exacerbated them.

While some of the prosecutor's comments implied that each part of the jury's task was to be informed by its view of the appropriateness of the death sentence for petitioner, those comments were not at all clear. Moreover, most of the prosecutor's comments reinforced the unconstitutional understanding of the jury's task which the instruction itself imparted. Thus, even with the pros-

ecutor's comments, a reasonable juror in petitioner's case still would have believed that his only task was to find the facts in aggravation and mitigation, to weigh them against each other, and to sentence petitioner in strict compliance with the outcome of the weighing process—without ever considering whether death was the proper sentence on all the evidence, or indeed, despite his belief that on all the evidence death was not the proper sentence.

The California Supreme Court believed that two areas of prosecutorial argument saved the instruction in petitioner's case. First, the prosecutor, joined by defense counsel, repeatedly told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. They also made it clear that the jury was free to assign whatever weight it wanted to any particular factor. *People v. Boyde*, 46 Cal.3d at 253. To the court, these arguments informed the jury that it had the discretion to decide the appropriate penalty: "Obviously, when jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they necessarily understand they have discretion to determine the appropriate penalty." *Ibid.*

However, nothing within this argument informed the jury that, in the assignment of weight to the aggravating circumstances, the jury should be concerned with whether these circumstances were themselves sufficiently substantial to call for the death sentence. Nor did any aspect of the argument inform the jury that its assignment of relative weight to the aggravating and mitigating circumstances should reflect its view, based on all the evidence, of whether death should be the punishment. Thus, while the arguments of counsel may have informed the jury of its absolute discretion to assign weight to the

enumerated factors, the arguments did not inform the jury that its discretion to determine punishment should ultimately be informed by the underlying principle that death should be imposed only if the aggravating circumstances, when discounted by the mitigating circumstances, were sufficiently weighty to require imposition of the death penalty.

The California Supreme Court also relied on two comments by the prosecutor that urged the jury to make its weighing decision with an eye toward whether a death sentence was warranted:

"[H]e . . . told the jury that its ultimate determination was: 'Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty.' [And] [i]n his final summation, the prosecutor stated, 'and the point now becomes, and the only question is, should it [the death penalty] be or should it not be imposed.' 46 Cal.3d at 253.

While out of context, these comments might be seen as urging the jury to take the constitutionally appropriate approach to the sentencing decision, in context, they plainly failed to do so.

In context, the prosecutor repeatedly taught the jurors, from voir dire to the rebuttal closing argument of the penalty trial, that the law created a rigid framework for their sentencing decision—a framework composed of "nine or ten" factors which would dictate the proper sentence. See J.App. 9, 14-15, 17, 21, 28, 30. Repeatedly, the prosecutor explained in voir dire that the jury findings within this rigid framework must dictate the sentence, not the juror's sense of the appropriate punishment. Thus, for example, the prosecutor explained to Edward Armas, who became the foreperson of the jury:

"And I believe it is quite possible that you, personally, if you were writing on a blank slate or writing the law yourself would, in a particular case, not think the death penalty appropriate, but yet the law says that it is." J.App. 9.

And in a colloquy with another juror, Joan Breeding, the prosecutor taught her to "understand that the decision isn't based on where I think it is appropriate." J.App. 7.

To juror Donna Ash, the prosecutor declared:

It [the framework for the sentencing decision] might mean, 'well, I don't think this crime deserves the death penalty,' yet as you look at what the factors are, you may be required to return a penalty of death." J.App.-18. See also *Id.* at 14.

In the penalty phase closing arguments, these themes were reiterated and an important element added. Thus, the prosecutor argued, consistent with his *voir dire*,

[Y]ou have to understand this is not a personal decision, it is not a situation where we toss the case to you and say, 'Hey, how do you feel today, do you want to impose the death penalty or not? . . . What we said to you is here is the rule of law, here is the evidence, please apply the evidence to the rules of law and make a decision based upon what the law requires of you, same process that you went through in deciding guilt.

"You are deciding the just punishment according to law. You're not deciding whether I like him, don't like him, whether it's my decision to impose the death penalty.

"You have been given very clear guidelines, eleven of them, to direct your decision in this case. You have taken an oath that you would be willing to do that, and that's what you have to do." RT 4823.

Earlier the prosecutor had defined for the jury what the law required:

[T]he test is whether aggravating outweighs mitigating or mitigating outweigh aggravating. . . .

"If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." J.App. 20-21.

Thus, in context, the prosecutor conditioned the jurors to believe that their own judgment about the appropriateness of the death sentence—even though it could properly have been "a reasoned *moral* response to the defendant's background, character, and crime," *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis in original)—was irrelevant. Their judgment was to be subordinated to the law's expectation (as he repeatedly defined it), and that expectation was exceedingly limited: to find the aggravating and mitigating circumstances, to weigh them, and to impose death even if the aggravation only "slightly" outweighed the mitigation. In this context, the prosecutor's argument that the "only question" for the jury to decide was, "should [the death penalty] be or should it not be imposed," meant very little. It could hardly be expected to evoke the jurors' "reasoned moral response" which the prosecutor had already consigned to oblivion.

Accordingly, neither the instructions nor the argument of counsel accurately or clearly informed the jury of the duties it must perform in order to come to an individualized sentencing decision in Mr. Boyde's case. Without question, a reasonable juror would have believed that his or her task was merely to determine the relative balance of aggravating and mitigating circumstances and to impose death if the aggravating circumstances preponde-

rated—even though he or she also believed, on the basis of all the evidence, that death was an inappropriate sentence for petitioner.

In any event, as previously noted, the test of an instruction is whether “a reasonable juror could have drawn from the instructions” an understanding of the sentencing process which conflicts with constitutional requirements. *Mills v. Maryland*, 100 L.Ed.2d at 394. Although in some instances an instruction may be so clear in its explicit language and in context that any reasonable juror would understand the instruction in a way that conflicts with the Constitution, the test is merely whether a reasonable juror “could”—not “would”—have such an understanding. Without question, in *this* case a reasonable juror would have believed that his or her task was merely to determine the relative balance of aggravating and mitigating circumstances and to impose death if the aggravating circumstances preponderated—even though he or she also believed, on the basis of all the evidence, that death was an inappropriate sentence for petitioner. The resulting judgment therefore plainly violated the Eighth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California affirming petitioner's sentence of death should be reversed.

Respectfully submitted,

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APPENDIX A

APPENDIX A

(FORMER INSTRUCTION)

*** CALJIC 8.84.1****PENALTY TRIAL—FACTORS FOR CONSIDERATION**

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

2a

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

3a

(PRESENT INSTRUCTION)

CALJIC 8.85

PENALTY TRIAL—FACTORS FOR CONSIDERATION

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle].

APPENDIX B

APPENDIX B

(FORMER INSTRUCTION)

★ CALJIC 8.84.2**PENALTY TRIAL—CONCLUDING INSTRUCTION**

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [each] defendant.

You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

[In this case you must decide separately the question of the penalty of each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] [all] defendants, but do agree as to the penalty of one [or more] of them, you must render a verdict as to the one [or more] on which you do agree.]

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it to this courtroom.

(PRESENT INSTRUCTION)

CALJIC 8.88

PENALTY TRIAL—CONCLUDING INSTRUCTION

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [the] [each] defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

[In this case you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] [all] defendants, but do agree on the penalty as to one [or more] of them, you must render a verdict as to the one [or more] on which you do agree.]

You shall now retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

No. 82-6813

FILED
SEP 2 1980

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

RICHARD BOWEN,

Petitioner,

THE PEOPLE OF THE STATE OF CALIFORNIA

Respondent.

TABLE OF THE HEARINGS

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QUESTIONS PRESENTED

1. Did the penalty phase of petitioner's capital case violate the Eighth and Fourteenth Amendments by precluding jury consideration of petitioner's mitigating background and character evidence, where the jury was instructed to consider a list of 11 factors in aggravation and mitigation, the last of which was a "catchall" factor which permitted the jury to consider "any other" circumstance which extenuated the gravity of the crime even though it was not a legal excuse for the crime, and where the other instructions, the nature of both the prosecution and defense evidence and the arguments of counsel made it clear that the jury was free to consider petitioner's evidence in mitigation?

2. Do the Eighth and Fourteenth Amendments preclude a trial court from instructing a penalty phase jury in a

- ii. -

capital case that it "shall" impose a sentence of death if it concludes that aggravating circumstances outweigh mitigating circumstances, where under California's weighing law each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, and in so doing determines the appropriate sentence?

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STATEMENT OF THE CASE

A jury convicted petitioner^{1/} of robbery and kidnapping for the purpose of robbery of a gas station attendant in Riverside, California. (Cal. Pen. Code, §§ 209, subd. (b), 211.) The jury also convicted petitioner of the robbery, kidnapping for the purpose of robbery and the first degree murder of Dick Gibson, a 7-Eleven store clerk, in Riverside. (Cal. Pen. Code, §§ 187, 189, 209, subd. (b), 211.) The jury made a special finding that petitioner personally killed the victim. The jury also found both charged special circumstances to be true (murder during the commission of a robbery [Cal. Pen. Code, § 190.2, subd. (a)(17)(i)], and murder during the commission of a kidnapping for the purpose of robbery

1. Petitioner was tried jointly with codefendant Carl Ellison, petitioner's younger nephew. Ellison waived jury trial and was tried by the court. (CT 218.)

[Cal. Pen. Code, § 190.2, subd.
(a)(17)(ii))]. (CT 367-379.)^{2/}

Following the penalty phase, the jury fixed the penalty at death. (CT 549.)

On automatic appeal, the California Supreme Court affirmed the judgment. (People v. Boyde (1988) 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25; a copy of the opinion of the California Supreme Court is attached as Appendix A to the petition for certiorari.)

Petitioner's petition for rehearing was denied on November 9, 1988, in an unpublished order. (Attached as Appendix B to the petition for certiorari).

2. "CT" refers to the Clerk's Transcript. "RT" refers to the Reporter's Transcript.

STATEMENT OF FACTS

Prosecution Evidence: Guilt Phase

A. The Robbery and Kidnapping of Lon Creech^{3/}

During the early morning hours on July 13, 1976, at gunpoint petitioner and another man robbed Mr. Lon Creech, the nightclerk at a 7-Eleven market in Riverside. (RT 2315-2319.)

Mr. Creech was placed in the trunk of his car and driven around, as petitioner talked about putting a .22 caliber bullet in Mr. Creech's head, or driving the car over a cliff with Mr. Creech in the trunk. Petitioner drove to an orange grove, ordered Mr. Creech to walk down the dirt road, and, gun in hand, told Mr. Creech to kneel down. After asking if Mr. Creech wanted a cigarette, petitioner told Mr. Creech not to turn

3. The robbery and kidnapping of Mr. Creech involved uncharged offenses admitted as modus operandi evidence.

around, then left in Mr. Creech's car.

(RT 2315-2325.)

B. The Robbery and Kidnapping of David Baker

At about 2:00 a.m. on January 5, 1981, petitioner robbed a Riverside gas station attendant, Mr. David Baker. Finding the trunk of Mr. Baker's car too small to fit Mr. Baker, petitioner ordered him to drive to a park with some orange trees. (RT 2392-2403.) Petitioner told Mr. Baker to walk toward some rocks, and kept saying he did not know what he was going to do with him. After about 10 minutes, petitioner ordered Mr. Baker back in the car. After stopping at a doughnut shop, petitioner fled. (RT 2392-2408.)

C. The Robbery, Kidnapping, and Murder of Mr. Gibson

On January 14, 1981, Mr. Dick Gibson was working as the clerk on the late night shift at the same 7-Eleven

store where Mr. Creech was robbed. (RT 2382-2383.)

When the owner arrived at 5:00 a.m., on January 15, 1981, Mr. Gibson was missing. Some money and items had been taken, and there was an apparent bullet hole in the store window. (RT 2383-2384, 2437-2440.)

A few hours later, Mr. Gibson's body was found in an orange grove. (RT 2483-2485.)

Mr. Gibson died from a bullet wound above the right ear. There was a second bullet wound in the forehead, fired from less than sixteen inches away. There were also gunshot wounds to the fingers of the right hand. Physical evidence was consistent with Mr. Gibson having fallen while running, and then kneeling at another location. (RT 2523-2545, 2761-2764.)

Mr. Baker identified a photo of petitioner, and property from the Baker robbery was recovered from petitioner's residence. (RT 2573-2575.) Petitioner initially denied the Baker robbery, but when the detective said, "I've got you," petitioner was silent a moment, then agreed, "You got me." (RT 2582-2584.)

Petitioner told Detective Callow, "I can't go back to jail," and asked if there was anything he could do to keep from returning to prison. Detective Callow said he could make no commitments. Petitioner asked, "What if I have information about a murder?" (RT 2585-2587.)

Petitioner said he had information about the murder of the football coach [Mr. Gibson] at the 7-Eleven market. Petitioner, who was 24 years old, initially claimed he was not present but knew that someone named "Big

Mike" and petitioner's 18 year old nephew, Carl Ellison, had committed the robbery and murder. (RT 2587-2593, 2825.)

Petitioner then changed his story and said he and Carl sat in the car while "Big Mike" entered the store, robbed the clerk and then told Carl to drive to an orange grove. As petitioner and Carl sat in the car, "Big Mike" ordered the clerk to get on his knees and put his hands on top of his head. "Big Mike" then shot the clerk. After the first shot, the clerk dropped his hands and turned partially around. "Big Mike" fired a second shot and the clerk dropped straight forward to the ground. "Big Mike" then rolled the clerk over and, from point-blank range, shot the clerk in the head. (RT 2633-2654.)

After additional questioning, petitioner admitted there was no such person as "Big Mike," and that he and Carl

had committed the robbery. (RT 2687-2688.) Petitioner blamed the robbery and killing on Carl. They entered the store and Carl robbed the clerk, then ordered him into the car. The clerk jumped out of the car and ran and fell. Carl pursued him and brought him back. (RT 2688-2707.)

Petitioner drove to the area of an orange grove. Carl ordered the clerk to get on his knees and to put his hands over his head. The man was pleading for Carl not to hurt him. Carl told him to be quiet and to face the orange trees.

Petitioner backed up and began to walk around and make sure no one else was in the area. Carl then fired a shot. The clerk took his hands from his head, and looked at his hand. Carl then fired a second shot into the back of the clerk's head. The clerk fell forward. Carl said he was not sure the man was dead, rolled him over, stood over him, and fired

another shot into his head. (RT 2707-2723.)

A shoeprint found by police near the victim's head was consistent with petitioner's foot size and inconsistent with Ellison's. Footprints attributable to Ellison were all below waist level of the body and at least four-and-a-half feet away from it. (RT 2500-2513, 2771-2778, 2784-2785, 2790-2791.)

Otharaean Owens, the mother of Carl Ellison and half-sister of petitioner, testified that she saw petitioner while he was in jail. She confronted him with the fact that he knew Carl would not kill anyone. Petitioner admitted that Carl was not involved in the killing. (RT 2824, 2832-2833.)

Codefendant Ellison testified at trial that petitioner planned the robbery and shot the victim. (RT 2962-2992.) Ellison initially lied to the police and

said he had shot the victim, before admitting petitioner was the one, because he loved his uncle (petitioner) and did not want him to go back to prison. (RT 2996-2999, 3249-3272.)

Defense Evidence: Guilt Phase

Petitioner testified that Ellison planned the robbery and killed Mr. Gibson. (RT 3422-3494.)^{4/}

Prosecution Evidence: Penalty Phase

On June 13, 1974, petitioner threw bricks at a van being driven down the street by a woman with two small babies inside. (RT 4042-4044.)

On June 14, 1974, petitioner hit a high school girl with his fist on the back of her neck as she was walking to her class. (RT 4025-4027, 4034-4037.)

4. The jury made a special finding, beyond a reasonable doubt, that petitioner personally killed the victim. (CT 379.)

Petitioner's parole officer testified that petitioner consistently failed to report to him as required, failed to adhere to his parole conditions, failed to make diligent efforts to find work, lied to him and generally failed to make "any effort to rehabilitate himself or engage in any kind of productive conduct." (RT 4061-4068.)

Petitioner committed five separate armed convenience store robberies during June and July of 1976. (Katherine Hagen-RT 4126-4129; Mark Page-RT 4132-4136; Timothy Hanks-RT 4140-4145; Charles Skalf-RT 4148-4158, 4186-4188; Edward Wall-RT 4163-4173.)

Petitioner planned an escape from jail during the trial of the charges in the present case, and to kill a jail guard if necessary. (RT 4190-4217, 4243-4245, 4269-4281.)

Penalty Phase-Defense Evidence

Petitioner came from a poor family, and did not know his real father. (RT 4421, 4488-4493, 4499-4503, 4576-4577.) He had impetigo and low blood pressure when he was young. (RT 4434, 4497-4499.) He did poorly in school, was truant and got in trouble with the law, but could not needed help. (RT 4513-4524, 4443, 4524-4526, 4578-4583, 4595.)

Petitioner wanted to make it on parole and get a job, but no one would give him a chance. (RT 4598, 4601-4602.)

Petitioner's family testified he was a giving person and treated his family well. (RT 4418-4419, 4423, 4426, 4442, 4451-4452, 4537, 4552-4559, 4600-4601, 4606-4608, 4613-4614, 4620-4623.)

Two psychologists testified petitioner has an inadequate personality, limited internal resources and low self-esteem. (RT 4306-4365, 4650-4707.)

SUMMARY OF ARGUMENT

The instructions permitted the jury to consider and give independent weight to petitioner's background and character evidence in mitigation.

(Lockett v. Ohio (1978) 438 U.S. 586 (plur. opn.); Eddings v. Oklahoma (1982) 455 U.S. 104.)

In considering the constitutionality of the instructions, the Court determines "what a reasonable juror could have understood the charge as meaning." (California v. Brown (1987) 479 U.S. 538, 541.)

Petitioner's contention involves an unreasonable and "hypertechnical" interpretation of the jury instructions that would transform a seven day penalty phase trial into a "charade." (Id., at p. 542.)

Petitioner's jury was instructed to "take into account and be guided by" a

lengthy list of 11 factors, the last of which was the "catchall" factor (k), which permitted the jury to consider "any other" possible circumstance in mitigation which "extenuates" the "gravity" of the crime, even circumstances that did not constitute any kind of "legal excuse" for the crime.

The California Supreme Court has characterized factor (k) as an "open-ended, catchall provision, allowing the jury's consideration of any mitigating evidence" offered by a defendant as a basis for a sentence less than death. (People v. Brown (1985) 40 Cal.3d 512, 541 (rev'd on other grounds, California v. Brown, supra, 479 U.S. 538), citing People v. Easley (1983) 34 Cal.3d 858, 878.) The jury would have similarly understood factor (k) as a "catchall" factor not limited to "legal" excuses, under which it was to consider "any other" mitigating factors, including petitioner's background

and character that, in the exercise of its moral judgment, might point toward a life sentence rather than death.

Factor (k) in CALJIC No. 8.84.1 tracks the identical language of California Penal Code section 190.3, factor (k), and no more violates Lockett than the statute, which was upheld on its face in California v. Ramos (1983) 463 U.S. 992, 1005, fn. 19. In Pulley v. Harris (1984) 465 U.S. 37, the Court upheld the 1977 version of California's death penalty law, which contained the identical language of factor (k), in what was then labeled factor (j).

Moreover, the validity of factor (k) cannot be determined in the abstract, but must be analyzed in light of the other instructions, the facts presented at the penalty phase, and the arguments of counsel. (California v. Brown, supra, 479 U.S. 538.)

Reasonable jurors would have known from the instruction to consider "all of the evidence" (RT 4831; J.A. 33), the nature of the other factors on which the jury was instructed, the fact that not only all of petitioner's evidence but all the prosecution's evidence consisted solely of background and character evidence, and the arguments of counsel, that they were free to consider and weigh petitioner's background and character evidence.

The jury was, therefore, fully able to express its "reasoned moral response" to all the evidence before it. (Penry v. Lynaugh (1989) ___ U.S. ___, 57 U.S.L.W. at 4965 (plur. opn.).)

California law provides that after weighing the circumstances in aggravation and mitigation, the jury "shall" impose a sentence of death if it concludes that "the aggravating

circumstances outweigh the mitigation circumstances." (Cal. Pen. Code, § 190.3.)

The provision that the jury "shall" impose a sentence of death is consistent with the Court's requirement that jury discretion must be channeled in order to provide reasoned decisions rather than capricious or purely emotional ones. (California v. Brown, *supra*, 479 U.S. 538, 542-543; Gregg v. Georgia (1976) 428 U.S. 153, 188-189; Zant v. Stephens (1983) 462 U.S. 862, 874; Franklin v. Lynaugh (1988) 487 U.S. ___, 101 L.Ed.2d 155, 170-171; Gardner v. Florida (1977) 430 U.S. 349, 358; Furman v. Georgia (1972) 408 U.S. 238.)

The Court upheld use of a mandatory weighing process in Proffitt v. Florida (1976) 428 U.S. 242, and another type of mandatory process in Jurek v. Texas (1976) 428 U.S. 262, 269. (See

Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at 169-171 (White, J. plur.), 172 (O'Connor, J. conc.).)

The Court upheld the California law in California v. Ramos, supra, 463 U.S. 992, and an earlier version in Pulley v. Harris, supra, 465 U.S. 37. (See also California v. Brown, supra, 479 U.S. 538, 540 (fn. *).)

Requiring the jury to return a penalty verdict consistent with its application of the weighing process can serve the "useful purpose" of precluding consideration of extraneous emotional factors unrelated to the evidence. (California v. Brown, supra, 479 U.S. at 543.) It ensures that the death penalty will be imposed "with regularity," rather than "freakishly or rarely." (Proffitt v. Florida, supra, 428 U.S. 242, 260 (White, J. conc.); Jurek v. Texas, supra, 428 U.S. 262, 278-279 (White, J. conc.), and serves

to "minimize the risk of wholly arbitrary and capricious action.") (Gregg v. Georgia, supra, 428 U.S. at pp. 188-189; see also Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at pp. 170-171; Zant v. Stephens, supra, 462 U.S. 862, 874; Gardner v. Florida, supra, 430 U.S. 349, 358.) It also promotes the rational and predictable administration of death penalty laws. (California v. Brown, supra, 479 U.S. at 541.)

By requiring the jury to return a sentence consistent with its application of the weighing process, California law provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (Furman v. Georgia, supra, 408 U.S. 238, 313 (White, J. conc.).) It also fosters reliability and furthers judicial review. (California v. Brown, supra, 479 U.S. at p. 543.)

Since under California law each juror "is free to assign whatever moral or sympathetic value he deems appropriate" to each of the factors, including factor (k), (People v. Brown, supra, 40 Cal.3d at p. 541), the jury under California law makes an "individualized assessment of the appropriateness of the death penalty" as required by the Eighth and Fourteenth Amendments. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at 4962.)

The Court has previously construed the California procedure as one in which "appropriateness" is determined as part of the weighing process. (California v. Brown, supra, 479 U.S. 538, 540.)

Both counsel made it clear to the jury in argument that the weighing process was not to be performed mechanically, and that it called for an

exercise of jury discretion and a moral assessment of the weight of the factors.

Neither a separate jury determination of "appropriateness" apart from the state's statutorily prescribed process, nor a jury determination of the "absolute weight" of the factors in aggravation is constitutionally required. (Proffitt v. Florida, supra, 428 U.S. 242; Jurek v. Texas, supra, 428 U.S. 262; Pulley v. Harris, supra, 465 U.S. 37; Zant v. Stephens, supra, 462 U.S. 862.)

Petitioner's argument is an unwarranted extension of this Court's jurisprudence. The Constitution requires no more than a rational state procedure which narrows the class of death eligible defendants and provides for the consideration of aggravating and mitigating factors and the exercise of some jury discretion in that process. (Lowenfield v. Phelps (1988) 484 U.S. ___,

98 L.Ed.2d 568, 583.) Petitioner's argument would engraft a third requirement of "unbridled discretion" for sentencers. To do so would improperly intrude into California's procedure for channeling and guiding sentencer discretion that is part of California's "effort to achieve a more rational and equitable administration of the death penalty." (Franklin v. Lynaugh, supra, 487 U.S. ___, 101 L.Ed.2d 155, 170.)

Moreover, even assuming, arguendo, any federal constitutional error in the instructions, it was at most harmless error. (Hitchcock v. Dugger (1987) 481 U.S. 393, 399; Satterwhite v. Texas (1988) 486 U.S. 249; Chapman v. California (1986) 386 U.S. 18.)

ARGUMENT

I

THE INSTRUCTIONS TOLD THE JURY
TO WEIGH ANY MITIGATING EVIDENCE
OFFERED BY PETITIONER

Petitioner contends that the jury was improperly restricted by CALJIC^{2/} No. 8.84.1 (RT 4831-4833; J.A. 33-34)^{6/} in its consideration of circumstances in mitigation of penalty, because the "catchall"^{2/} factor (k) portion of the

5. CALJIC is an acronym for standard jury instructions used in criminal cases in California. The instructions are drafted by a committee of California judges.

6. The language of the instruction is an exact copy of the pertinent portion of California Penal Code section 190.3. In addition, the parties "agreed upon" a definition of "extenuate," which was given to the jury. (RT 4789, 4833; J.A. 26, 34.)

7. The California Supreme Court has repeatedly characterized factor (k) as a "catchall" provision. (See e.g. People v. Dyer (1988) 45 Cal.3d 26, 83, cert. den., 102 L.Ed.2d 347 (1988); People v. Belmontes (1988) 45 Cal.3d 744, 807, cert. den., 102 L.Ed.2d 980

instruction referred to "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," and thereby precluded the jury from considering petitioner's background and character evidence in mitigation, which was not immediately related to the crime.

A capital defendant must be permitted to present, and the trier of penalty must be free to consider and give independent weight to, any relevant mitigating evidence regarding the defendant's character or record and any

(1989); People v. Brown (1985) 40 Cal.3d 512, 541, rev'd on other grounds California v. Brown (1987) 479 U.S. 538.)

Petitioner's counsel referred in his argument to factor (k) as the "catchall" provision which encompassed any other factor in mitigation which did not necessarily fit within one of the other categories, and which permitted the jury to look at petitioner "in his totality" and "as a human being" and "an individual." (RT 4829-4831; J.A. 31-33.) (See People v. Boyde (1988) 46 Cal.3d 212, 251.)

circumstances of the offense. (Lockett v. Ohio (1978) 438 U.S. 586 (plur. opn.); Eddings v. Oklahoma (1982) 455 U.S. 104; Skipper v. South Carolina (1986) 476 U.S. 1, 4-5; Mills v. Maryland (1988) 486 U.S. ___, 100 L.Ed.2d 384; Sumner v. Shuman (1987) 483 U.S. 66, 97 L.Ed.2d 56; Hitchcock v. Dugger (1987) 481 U.S. 393; Penry v. Lynaugh (1989) ___ U.S. ___, 57 U.S.L.W. 4958.) A state nevertheless has a legitimate "role in structuring or giving shape to the jury's consideration of these mitigating factors." (Franklin v. Lynaugh (1988) 487 U.S. ___, 101 L.Ed.2d 155, 169 (plur. opn.).)

Petitioner's contention involves an unduly narrow and "hypertechnical" construction of the so-called "unadorned" factor (k)^{8/} in particular, and the jury

8. The California Supreme Court refers to language in the "literal terms of [California Penal Code] section 190.3, factor (k)" as the "unadorned" factor (k). (See, e.g., People v.

Allison (1989) 48 Cal.3d 879, 900, mod. 49 Cal.3d 38c.) It was the "unadorned" factor (k) which was given in this case. Subsequent to petitioner's trial, the California Supreme Court impliedly held in People v. Easley (1983) 34 Cal.3d 858, that instruction in the unadorned language of California Penal Code section 190.3(k) "was not unconstitutional," but nevertheless directed trial courts thereafter to clarify factor (k) by adding the specific language of Lockett and Eddings that it was free to consider "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" (Id., at p. 878, fn. 10.)." (People v. Poggi (1988) 45 Cal.3d 306, 346, cert. den., 106 L.Ed.2d 606 (1989).)

In People v. Brown, supra, 40 Cal.3d 512, 544, fn. 17, the California Supreme Court announced that as to cases in which the jury had been instructed in the language of the unadorned factor (k), it would examine each such appeal on its merits "to determine whether the jury may have been misled to the defendant's prejudice. (40 Cal.3d at p. 544, fn. 17.)" (People v. Poggi, supra, 45 Cal.3d at p. 346.) In conducting such examination, the California Supreme Court examines "the instructions and arguments as a whole to determine whether the jury was adequately informed of the proper scope of mitigating evidence." (People v. Allison, supra, 48 Cal.3d at p. 899, citing California v. Brown (1987) 479 U.S. 538, 546 (conc. opn. of O'Connor, J.); see also People v. Poggi, supra, 45 Cal.3d at p. 346.)

instructions at the penalty phase as a whole, and would turn the penalty phase of the trial into a "virtual charade."

(California v. Brown, supra, 479 U.S. 538, 542.)

The test is "what a reasonable juror could have understood the charge as meaning." (Id., at p. 541, quoting Francis v. Franklin (1985) 471 U.S. 307, 315-316.) "To determine how a reasonable juror could interpret an instruction, we 'must focus initially on the specific language challenged.' Francis v. Franklin, 471 U.S., at 315. If the specific instruction fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the

In affirming the judgment in this case, the California Supreme Court did just that. (People v. Boyde, supra, 46 Cal.3d at p. 251.)

law. Ibid." (California v. Brown, supra, 479 U.S. at p. 541.)

In California v. Brown, supra, 479 U.S. 538, every justice of the Court indicated an instruction cannot be evaluated in the abstract. Rather, an instruction must be analyzed in light of the facts presented at the penalty phase and other instructions (California v. Brown, supra, 479 U.S. at p. 542 [Chief Justice Rehnquist, joined by Justices White, Powell and Scalia]) or in light of arguments of counsel and the other instructions (Id., at p. 546 [O'Connor, J., concurring]), (Id., at pp. 547-563 [Brennan, Marshall, Stevens, Blackmun, JJ., dissenting].) (See also Mills v. Maryland, supra, 486 U.S. ___, 100 L.Ed.2d 384, 406 [Rehnquist, C.J., dissenting].)

California Penal Code section 190.3^{2/} provides that evidence may be presented by both the people and the defendant as to any matter relevant to mitigation and sentence including, but not limited to ". . . the defendant's character, background, history, mental condition and physical condition."

The California Supreme Court has rejected petitioner's construction of factor (k), and has characterized factor (k) as an "open-ended, catchall provision, allowing the jury's consideration of any mitigating evidence" offered by a defendant as a basis for a sentence less than death. (People v. Brown, supra, 40 Cal.3d at p. 541, citing People v. Easley, supra, 34 Cal.3d 858, 878.)

In California v. Ramos (1983) 463 U.S. 992, this Court held that Ramos

9. All statutory references are to the California Penal Code unless otherwise indicated.

could not successfully contend "that the California sentencing scheme violates the directive of Lockett v. Ohio, 438 U.S. 586 (1978)," since it "permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case." (California v. Ramos, supra, 463 U.S. at p. 1005, fn. 19; see also California v. Brown, supra, 479 U.S. 538, 540 (fn. *).)

Similarly, in Pulley v. Harris (1984) 465 U.S. 37, after quoting in full the various factors to be considered in aggravation and mitigation under California law (Id., at p. 52, fn. 14), including what was factor (j) under the 1977 law, and is now the unadorned factor (k) under the 1978 law, the Court upheld California's system on its face as providing "suitably directed and limited" jury discretion, citing Gregg v. Georgia

(1976) 428 U.S. 153, 189. (Pulley v. Harris, supra, 465 U.S. at p. 53.)

The Court's reading of California's 1978 death penalty law on its face in Ramos, including the unadorned factor (k), and its reading of the identical factor (j) from the 1977 law, quoted in Pulley v. Harris, manifestly did not suggest to the Court that jurors were precluded by the language of the statutory factors from considering any evidence offered by a defendant in mitigation (California v. Ramos, supra, 463 U.S. at p. 1005, fn. 19), and it cannot be assumed that reasonable jurors would understand the identical language of the instructions in this case any differently.

Since the wording of Penal Code section 190.3, subdivision (k) is identical to the wording of CALJIC No. 8.84.1(k), as given in this case, the instruction on its face no more violates

Lockett than does the language of Penal Code section 190.3, subdivision (k) itself.

The jury in this case could not reasonably have understood factor (k) other than as construed by the California Supreme Court in People v. Brown, supra, 40 Cal.3d at p. 541, and as previously understood by this Court.

Factor (k) told the jury to consider "any" other possible circumstance in mitigation which "extenuates" the "gravity" of the crime, even circumstances that did not constitute any kind of "legal excuse" for the crime. "Extenuate" was defined as meaning "to lessen the seriousness" of the crime, "as by giving an excuse." (RT 4833; J.A. 34.)^{10/}

10. The standard "unadorned" factor (k) portion of the instruction was supplemented in this case by the definition of the word "extenuate." Counsel for petitioner specifically "agreed" to the definition of the word "extenuate" given by the court, and told

Circumstances which did not constitute any kind of "legal excuse" could only be reasonably understood by the jurors as involving a non-legal circumstance which mitigated or "extenuate[d]" the "gravity" of the crime and thereby provided a basis for the lesser sentence. The jury was told earlier in the instruction that, having determined all the legal issues, its only remaining function was to determine the penalty, either death or life without parole. (RT 4831; J.A. 33.) The jury would, therefore, reasonably have understood the "gravity" of the crime to refer to the appropriate penalty to be imposed.

The evidence presented by petitioner at the penalty phase was precisely evidence which did not

the jury it was on that basis that he would be arguing the case. (RT 4789, J.A. 26.)

constitute any kind of "legal excuse" for the crime, but which might nevertheless appeal to the jurors' moral judgment in assessing the "seriousness" or "gravity" of the offense, that is, in determining whether life without parole or death was the appropriate penalty in petitioner's case. The jury would reasonably have understood factor (k) as a "catchall" factor, just as it has been construed by the California Supreme Court, not limited to "legal" excuses, under which it was to consider "any other" mitigating factors, including petitioner's background and character that, in the exercise of its moral judgment, might point toward a life sentence rather than death.

This conclusion is strongly supported by a consideration of factor (k) in context. The jury was first told in CALJIC No. 8.84.1 that in determining penalty it was to consider "all of the

evidence which has been received during any part of the trial of this case." (RT 4831; J.A. 33.) Over the course of four days petitioner presented eight witnesses (six family members and two psychologists), whose testimony consumes over two volumes of evidence in his behalf at the penalty phase. (RT 4301-4746.) The jury could not have been faithful to the court's instruction that it consider "all of the evidence" before it in determining the penalty, and at the same time have ignored the mass of evidence presented by petitioner at the penalty phase, all of which consisted of background and character evidence.

Moreover, the jurors could not reasonably have believed that factor (k) was limited to the circumstances of the crime, because other factors clearly involved the background and character of the defendant. Factor (c) was "the

presence or absence of any prior felony conviction." This factor could only have been understood by the jurors as relating to the background and character of the defendant, not to the circumstances of the offense. Likewise, factor (b) related solely to petitioner's use or attempted use of force or violence on prior occasions, and hence to his background and character. The California Supreme Court has held that factors (b) and (c) pertain only to criminal acts other than those for which the defendant was convicted in the present proceeding. (People v. Miranda (1987) 44 Cal.3d 57, 105-106, fn. 28, cert. den., 100 L.Ed.2d 613 (1988); People v. Kimble (1988) 44 Cal.3d 480, 505; People v. Melton (1988) 44 Cal.3d 713, 763, cert. den., 102 L.Ed.2d 346 (1988); People v. Malone (1988) 47 Cal.3d 1, 45-46, mod. 47 Cal.3d 745a, cert. den., 104 L.Ed.2d 998 (1989).)

In addition, factors (d) and (h) would typically involve matters extrinsic to and occurring over a period of time prior to the current offense. A defendant might have a long history of mental illness, prior instances of delusional conduct or past hospitalizations. These would be matters in the defendant's background, admissible under factors (d) and (h).^{11/} Similarly, factor (f) could, in any given case, involve the defendant's background.

Thus, the jury would have known that it was free to consider petitioner's background and character evidence in determining the appropriate penalty.

11. Petitioner offered no such evidence. Reasonable jurors would, however, understand from the very language of such factors that they were not limited in their consideration of factors in mitigation to circumstances attendant to the crime, but could consider matters in petitioner's background.

That certain of the factors are phrased in terms of "whether or not the offense was committed" under certain circumstances does not support petitioner's conclusion. Certain factors are only relevant to the extent that they bear upon the commission of the offense. For example, if the defendant offered evidence that he was intoxicated six months before the crime, with no evidence to suggest that he was a chronic alcoholic or that he was intoxicated at the time of the commission of the offense [factor (h)], such evidence would not be relevant under factor (h) or under Lockett. Lockett expands but does not eliminate the requirement of relevancy for purposes of determining penalty. (Lockett v. Ohio, supra, 438 U.S. at p. 604, fn. 12.)

But the jury would have no reason to think it was precluded from considering petitioner's background and

character evidence under factor (k). Indeed, factors (b) and (c) are not related to the circumstances of the crime, and are simply relevant because they bear upon the background and character of the person who committed the crime for which the jury is determining the penalty. Factor (k) would reasonably be understood by the jury as permitting it to consider any mitigating background and character evidence.

Petitioner's contention ignores the fact that all of the prosecution's evidence at the penalty phase likewise consisted of evidence relating solely and exclusively to petitioner's background and character. None of it related to the circumstances of the charged offenses. The prior assault on Colleen Dietzman (RT 4025-4027, 4034-4037), the brick attack on Mrs. Mary Matlock (RT 4042-4045) the string of prior robberies committed by

petitioner (Katherine Hagen--RT 4126-4129); Mark Page--RT 4132-4138; Timothy Hanks--RT 4140-4145; Charles Skalf--RT 4148-4158; Edward Wall--RT 4163-4173), petitioner's failure to make any effort to rehabilitate himself or engage in any kind of productive conduct when he was formerly on parole (RT 4061-4068), and petitioner's escape plan, which involved the killing of a jail guard if necessary (RT 4190-4217, 4269-4289), was all evidence presented by the prosecution concerning petitioner's background and character.

The jury could not have reasonably believed it must ignore petitioner's background and character evidence, while giving weight to the prosecution's background and character evidence.^{12/}

12. Petitioner argues that a broad description of the evidence to be considered "cannot cure a specific directive to consider that evidence only in relation to certain issues," citing

Lockett v. Ohio, *supra*, 438 U.S. at p. 608. (Petitioner's Brief, at p. 23.) But factor (k) is not limited to "certain issues." It is an obvious "catchall" provision which authorizes the jury to consider "any" other circumstances in mitigation shown by the evidence, unlike the Ohio statute, which limited the jury to three specific circumstances, contained no catchall provision analogous to factor (k), and did not provide for the kind of weighing of aggravating and mitigating circumstances that is the heart of the California procedure.

For the same reason, petitioner's argument that the instruction to consider "all" the evidence introduced during any part of the trial (RT 4831; J.A. 33) would be seen by the jurors as being in "conflict" with factor (k) (Cabana v. Bullock (1986) 474 U.S. 376, 383, fn. 2; Francis v. Franklin (1985) 471 U.S. 307, 322) is simply wrong. Jurors would naturally assume that the instructions were consistent with each other, and would reasonably conclude that they were to consider "all" the evidence (RT 4831; J.A. 33) in determining whether there were "any" other circumstances in mitigation (RT 4833; J.A. 34).

Indeed, if the jurors had the slightest doubt about that matter, they could easily have asked the court for clarification. Likewise, defense counsel could have objected to the instructions and requested a ruling from the court. The purported inconsistency in the instructions was clearly "not apparent to one on the spot." (Cf. Lowenfield v. Phelps (1988) 484 U.S.

Nor was an "antisympathy instruction" (see California v. Brown, supra, 479 U.S. 538) given at the penalty phase, which further supports the conclusion that the jury would have considered petitioner's evidence. (RT 4831-4836.)

Petitioner argues that the jury could not have understood the instruction to consider "all" the evidence as including mitigating factors not specified among the listed mitigating factors without the jury simultaneously improperly construing the same instruction as permitting it to consider aggravating factors outside the list of statutory aggravating circumstances, contrary to the holding of the California Supreme Court in People v. Boyd (1985) 38 Cal.3d 762, 772-775, that non-statutory aggravating circumstances cannot be considered.

But factor (k) is expressly limited to mitigating circumstances, i.e., any other circumstance which "extenuates" the gravity of the crime, and the jury would have no reason to look for non-statutory aggravating factors, since there was no prosecution evidence which was not properly considered under the statutory aggravating factors (a), (b) and (c). Moreover, even if the jury somehow were to make such an assumption, there would at most be state law error, not error of federal constitutional dimension.

(Barclay v. Florida (1983) 463 U.S. 939; Harris v. Pulley (9th Cir. 1982) 692 F.2d 1189, 1194 (rev'd on other grounds, Pulley v. Harris, supra, 465 U.S. 37).)

The arguments of counsel, which the jury was told to consider (RT 4836; J.A. 35), made it clear to the jury that petitioner's evidence was to be weighed. Petitioner's counsel forcefully argued to

the jury at length that the evidence presented by petitioner at the penalty phase was relevant under what he referred to as the "catchall" factor (k), and that factor (k) could, in the jury's discretion, outweigh all the factors in aggravation, and warrant a sentence of life without parole. (RT 4785-4790, 4828-4831; J.A. 25-27, J.A. 31-33.) He concluded his argument by telling the jurors,

"So, we are not asking you, we are not asking you to step outside those factors, we are asking you to step inside them fully and completely. Can K outweigh A through J? If you find that it does, it does, and that is your choice. That is what we are asking you to do."
(RT 4830, J.A. 32-33.)

The prosecutor never suggested that the jury could not consider, as a matter of law, any of petitioner's evidence in mitigation. He argued simply that petitioner had always attempted to blame everyone else for his own failures,

and that the jury should reject, on its merits, the argument of petitioner's counsel that the failures of his "probation officers, parole officers, family" "should mitigate this particular crime." (RT 4823-4824; J.A. 28-29; emphasis added.) The prosecutor argued not that the jury could not legally give any weight to that argument, but that the jury "should" give little or no weight to that argument, in the exercise of its discretion and moral judgment, because petitioner had used that argument too many times and it was up to the jury to say "no more." (RT 4824; J.A. 29.)

The prosecutor argued that, "Nothing I have heard lessens the seriousness of this crime, nothing." (RT 4824; J.A. 29; emphasis added.) This was a statement of the prosecutor's personal opinion based on the evidence, not a

statement of law which precluded the jury from concluding otherwise.

At another point the prosecutor similarly argued to the jury that it was being asked to consider whether what "it" had heard "about this Defendant" extenuated the gravity of the crime "and I would suggest it does not." (RT 4776-4777; J.A. 23.) The prosecutor thus acknowledged the background evidence offered by petitioner, stated it was up to the jury to decide whether it extenuated the gravity of the crime and urged the jury to agree with his evaluation that it should not. But the prosecutor never suggested that the jury was legally precluded from reaching a different conclusion.

The prosecutor told the jury the weighing process was "not a process of counting, it's not 10 to 1, it is a process of weighing," and if the jury

found that "one factor mitigates" (which could only have been factor (k), since petitioner offered no evidence under any other factor), the jury "should decide whether or not that one factor in mitigation outweighs all those factors in aggravation and then decide the case."

(RT 4825, J.A. 30.)

The jury heard the views of two advocates on how much weight should be given to the evidence presented by petitioner. What it never heard was anything from either the prosecutor or defense counsel that it was precluded by law from giving any weight to any of the evidence offered by petitioner in mitigation. The jury heard exactly the opposite. (People v. Boyde, supra, 46 Cal.3d at p. 251.)

Petitioner alludes to references in the sequestered, individual voir dire examination of certain prospective jurors,

wherein the prosecutor stated that the California procedure as it then existed was "a very strict structure" which involved the jury taking the evidence and "plug[ging] it into the factors" upon which the jury would be instructed. (RT 1158-1159, 1976; J.A. 9, 17.)

Voir dire examination is simply too far removed, both temporally and conceptually, from the formal instruction of the jury on the law by the court at the conclusion of the case to serve as a valid indicium of whether the jury misunderstood the court's penalty phase instructions. (Darden v. Wainwright (1986) 477 U.S. 168, 183, fn. 15.) In Darden, the Court rejected the proposition that comments made by the prosecutor at the "guilt-innocence stage of trial" could provide a basis under Caldwell v. Mississippi (1985) 472 U.S. 320, for overturning the penalty decision. (See also People v. Boyde,

supra, 46 Cal.3d at 254.) Petitioner cites only Mann v. Dugger (11th Cir. 1987) 817 F.2d 1471, 1483, cert. den., ___ U.S. ___, 103 L.Ed.2d 821 (1989), which is inconsistent with the Court's conclusion in Darden.

The prosecutor's statements here were even further removed from the penalty phase than in Darden. They occurred before the jurors were even sworn to try the guilt phase of the trial. The jury was instructed at the guilt phase that the arguments of counsel were not evidence. (RT 3933.) The first time the jury was told it could consider the statements of counsel for any purpose was at the penalty phase. (RT 4836, J.A. 35.) The court never approved the statements of either counsel during voir dire examination as necessarily precise and accurate statements of the law.

The voir dire examination of Mr. Armas occurred on January 26, 1982, while the examination of Ms. Ash occurred on February 8, 1982. (RT 1142, 1949, et seq.) The jury was instructed at the penalty phase on March 29, 1982, approximately two months later, and after it had been instructed under different instructions applicable at the guilt phase, had deliberated, had returned guilt phase verdicts, and had heard extensive penalty phase evidence. (CT 529.) It is unreasonable to assume that the jurors remembered statements of counsel during voir dire examination, and further that they were contemplating them in conjunction with the penalty phase instructions delivered by the court two months later.

Moreover, the purpose of voir dire examination under California law is to determine possible bias or prejudice of

prospective jurors, not "to indoctrinate the jury, or to instruct the jury in matters of law.'" (People v. Crowe (1973) 8 Cal.3d 815, 824.)^{13/}

There is a substantial difference between considering the arguments of counsel in determining whether the jury was misled (California v. Brown, supra, 479 U.S. at 546 (O'Connor, J., conc.)), and considering statements of counsel during voir dire examination of jurors. Arguments of counsel are addressed to the instructions which immediately follow by the court, and are fresh in the jury's mind. Voir dire examination is simply an effort to explore

13. The California Supreme Court has somewhat broadened the scope of voir dire examination (People v. Williams (1981) 29 Cal.3d 392, 402-412), but it is still the rule that the purpose of voir dire examination is not to "indoctrinate the jury" on the law. (People v. Melton (1988) 44 Cal.3d 713, 750, fn. 14, cert. den. 102 L.Ed.2d 346 (1988).)

generally the attitudes of potential jurors who are not yet even sworn to try the case.

In any event, petitioner takes the prosecutor's statements out of context and misconstrues them. The prosecutor prefaced his remarks to Mr. Armas concerning the "strict structure" of the law with his statement that ". . . we can't have a lot of people up here as jurors, sitting there and now debating whether they like the law or not like the law," that the jurors were not "writing on a blank slate or writing the law yourself," and that the jurors must apply the law as given. (RT 1158; J.A. 9; emphasis added.) The thrust of the prosecutor's inquiry was his question whether Mr. Armas would be able to "go along with the law," rather than "substitute your personal ideas" as to what the law should be. (RT 1159; J.A. 9-

10.) The prosecutor also told Mr. Armas that the goal of the law was "to insure a rational reasoned decision as best we can do this question," as opposed to untethered "sympathy and emotion" which "rises and falls" without rhyme or reason. (RT 1160; J.A. 1160.)

The prosecutor similarly told Ms. Ash that under the former laws jurors could decide on the penalty "with no guidelines at all," which could result in different verdicts depending on whether it was "Monday" or "Tuesday," which the courts decided was "too unpredictable and unfair." (RT 1976; J.A. 17.)

It was in this context that the prosecutor stated that the law had created "about nine or ten factors" and the jury "essentially" took the evidence and "plug[ged] it into the factors," as a result of which the process was "not so

much" a matter of the juror's personal opinion. (RT 1976-1977; J.A. 17.)

The thrust of the prosecutor's voir dire examination was consistent with the Court's requirement that jury discretion must be channeled in order to provide reasoned decisions rather than capricious or purely emotional ones.

(California v. Brown, supra, 479 U.S. 538, 542-543; Gregg v. Georgia, supra, 428 U.S. 153, 188-189; Zant v. Stephens (1983) 462 U.S. 862, 874; Franklin v. Lynaugh (1988) 487 U.S. ___, 101 L.Ed.2d 155, 170-171; Gardner v. Florida (1977) 430 U.S. 349, 358; Furman v. Georgia (1972) 408 U.S. 238.)

Taken in context, and given the limited purposes of voir dire examination, the California Supreme Court correctly concluded that the comments during voir dire were proper since the prosecutor was "contrasting the current death penalty law

with the former one" held unconstitutional in Furman for lack of standards "governing the jury's exercise of discretion in sentencing," and he was attempting to explain that current law did not leave jurors "rudderless" but provided "concrete standards to guide the jury's exercise of discretion." (People v. Boyde, supra, 46 Cal.3d at 254, fn. 6.)

Petitioner and amicus California Appellate Project cite excerpts from the trial records in particular California capital cases in which jurors were assertedly misled concerning the scope of the unadorned factor (k).^{14/} A similar

14. Petitioner and amicus neglect to cite the resulting California Supreme Court opinions.

In two of the cases cited by petitioner, the California Supreme Court reversed the penalty, based in whole or in part on the jury having been misled by the arguments of counsel, concerning the scope of factor (k). (People v. Davenport (1985) 41 Cal.3d 247; People v. Edelbacher (1989) 47 Cal.3d 983.) In People v. Lucero (1988) 44 Cal.3d 1006, the penalty was reversed for exclusion

attempt was implicitly rejected by the majority in California v. Brown, supra (see dissenting opinion of Brennan, J.,

of mitigating evidence. The California Supreme Court reversed the judgment in its entirety in People v. Bigelow (1984) 37 Cal.3d 731. The California Supreme Court granted a writ of habeas corpus in In re Sixto (1989) 48 Cal.3d 1247, on the ground of ineffective assistance of counsel, before even hearing the appeal. Thus, the California Supreme Court took corrective action in each case where it was required.

In People v. Guzman (1988) 45 Cal.3d 915, 956-958, cert. den. ___ U.S. ___, 102 L.Ed.2d 1005 (1989); People v. McDowell (1988) 46 Cal.3d 551, 577-579, cert. den., ___ U.S. ___, 104 L.Ed.2d 441 (1989); and People v. Keenan (1988) 46 Cal.3d 478, 514-515, cert. den., ___ U.S. ___, 104 L.Ed.2d 169, the California Supreme Court held in each case that under all the circumstances the jury had not been misled.

The result in each case was based upon the particular circumstances of that case. These cases do not support the proposition that petitioner's jury misunderstood the scope of its function.

The California Supreme Court has yet to rule in People v. Payton, Cal.Sup.Ct.No. S004437 and People v. Hitchings, Cal.Sup.Ct.No. S004524.

479 U.S. at pp. 553-558).^{15/} The issue before the Court is what the jury in petitioner's case reasonably would have understood, based upon the language of the instructions as a whole, the nature of the evidence before the jury, and what petitioner's jury, not some other jury, was told by counsel in argument. Whether the jury was misled by what occurred in some other case cannot demonstrate that petitioner's jury misunderstood its ability to consider the mitigating evidence before it.

15. The danger in relying on representations of counsel concerning what is contained in selected isolated statements from records not before the Court is demonstrated by the reference in Justice Brennan's dissenting opinion in California v. Brown, supra, to the trial record in this very case as illustrative of the gloss that consistently has been placed on "the antisympathy instruction." (California v. Brown, supra, 479 U.S. at p. 554 (Brennan, J., dissenting, citing People v. Boyde, CR 22584).)

An "antisympathy instruction" was not given in the penalty phase of the instant case. (RT 4831-4836.)

While "strained in the abstract," petitioner's contention "is simply untenable when viewed in light of the surrounding circumstances." (California v. Brown, supra, 479 U.S. at p. 542.) Petitioner's interpretation of the challenged instruction would ignore the "catchall" nature of factor (k), the instruction to consider "all the evidence" before the jury, the fact that other factors involved petitioner's background and character, the reality that the prosecution's evidence likewise consisted entirely of background and character evidence, and the arguments of counsel which were premised on the jury's consideration of all the evidence. In short, petitioner's contention would transform a seven day penalty phase trial (including four days of testimony by petitioner's eight witnesses, consuming over two volumes of Reporter's Transcripts

-- RT 4301-4746) into a "virtual charade."
(California v. Brown, supra, 479 U.S. at
p. 542.) Such an interpretation is
manifestly unreasonable and would be
rejected by reasonable jurors. (Ibid.)

Petitioner's jury simply could
not have been confused about the intent
and effect of factor (k). Reasonable
jurors could only have understood that
they were to consider all the evidence
before them, and that factor (k) meant
that if there were any other mitigating
factors in the evidence, which did not
come within one of the other factors on
which they had been instructed, they were
free to be considered, and indeed were
required to be considered, under the
"catchall" factor (k).

Unlike the situation in Lockett,
in California the jury can consider under
the "catchall" factor (k) any mitigating
evidence which does not come within one of

the other specific factors. (California v. Ramos, supra, 463 U.S. at p. 1005, fn. 19.)

Petitioner's reliance on Penry v. Lynaugh, supra, ___ U.S. ___, 57 U.S.L.W. 4958, is misplaced. In Penry, similar to Lockett, the jury was circumscribed by three special issues under state law in its consideration of any evidence in mitigation, unlike California's procedure which provides for jury weighing of an extensive list of aggravating and mitigating circumstances, together with the mitigating "catchall" factor (k). Texas conceded that Penry's evidence of mental retardation could not be given independent mitigating weight within the three statutory questions. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at 4964.) Indeed, it was likely to have been viewed not as mitigating but as aggravating under the

second special issue. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at 4963.)

Here, the jury was free to give independent mitigating weight to petitioner's evidence under the "catchall" factor (k), something that was completely lacking in both Lockett and Penry. Moreover, unlike Penry, counsel for petitioner here specifically "agreed" to the definition of the word "extenuate" given by the court, and told the jury it was on that basis that he would be arguing the case. (RT 4789, J.A. 26.) Nor did the prosecutor exploit the instructions to petitioner's disadvantage. (See Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at pp. 4960-4964.)

CALJIC No. 8.84.1 allowed the jury to treat petitioner as an individual. (See, Lockett v. Ohio, supra, 438 U.S. at p. 605.) It did not prevent the jury from

considering any relevant, mitigating evidence in the case. (See, Franklin v. Lynaugh, supra, 487 U.S. ___, 101 L.Ed.2d at p. 160.) Thus, there was no risk that the death penalty would be imposed in spite of the existence of factors calling for a less severe penalty. The jury was fully able to express its "reasoned moral response" to all the evidence before it. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at p. 4965.)

II

INSTRUCTING THE JURY, IN
ACCORDANCE WITH CALIFORNIA PENAL
CODE SECTION 190.3, THAT IT
"SHALL" DECIDE THE APPROPRIATE
PENALTY, DEATH OR LIFE WITHOUT
PAROLE, BY WEIGHING AGGRAVATING
CIRCUMSTANCES AGAINST MITIGATING
CIRCUMSTANCES IS
CONSTITUTIONALLY PERMISSIBLE

California law requires a
"weighing" of aggravating and mitigating
circumstances by the jury in order to
determine the appropriate penalty, death
or life without possibility of parole.
The trier of fact "shall" impose a
sentence of death if the trier of fact
concludes that "the aggravating
circumstances outweigh the mitigation
circumstances" and likewise "shall" impose
a sentence of life in prison without the
possibility of parole if "the mitigating
circumstances outweigh the aggravating
circumstances." (Cal. Pen. Code, §

190.3.)^{16/} California law is evenly

16. Of the 37 states with death penalty laws, 14 (including California) require the death sentence where aggravating factors outweigh mitigating factors, or where aggravating factors or their equivalent are unmitigated. (Ariz. Rev. Stat. Ann., § 13-703; Cal. Pen. Code, § 190.3; Conn. Gen. Stat., § 53a-46a; Idaho Code, § 19-2515; Ill. Rev. Stat., ch. 38, Para. 9-1; Md. Ann. Code, Art. 27, § 413; Mont. Code Ann., § 46-18-305; N.J. Rev. Stat., § 2C:11-3; Ohio Rev. Stat. Ann., § 2929.03; Or. Rev. Stat., § 163.150; 42 Pa. Cons. Stat., § 9711; Tenn. Code Ann., § 39-2-203; Tex. Code Crim. Proc. Ann., Art. 37.071; Wash. Rev. Code Ann., § 10.95.080.)

The courts which have reviewed these statutes have, with one exception, rejected the contention that such statutes constitute invalid mandatory death penalty statutes, since any mitigating circumstance may preclude a capital sentence. (See State v. Roscoe (1984) 145 Ariz. 212, 700 P.2d 1312, cert. den., 471 U.S. 1094 (1985); State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, cert. den., 470 U.S. 1059 (1985); State v. Jordan (1983) 137 Ariz. 504, 672 P.2d 169 (1983); see Adamson v. Ricketts (9th Cir. 1985) 758 F.2d 441, reh. en banc, rev'd on other grounds, (9th Cir. 1986) 789 F.2d 722, rev'd, 483 U.S. 1 (1987); contra Adamson v. Ricketts (9th Cir. en banc 1988) 865 F.2d 1011, cert. pending; People v. Hamilton (1988) 46 Cal.3d 123, cert. den., 103 L.Ed.2d 238 (1989); People v. Brown, supra, rev'd on other grounds, California v. Brown, supra, 479 U.S.

balanced.

The jury in this case was instructed in the language of California Penal Code section 190.3 that it was to determine the appropriate penalty by weighing the factors in aggravation against the factors in mitigation. (RT 4836; J.A. 35.)

538; People v. Albanese (1984) 104 Ill.2d 504, 473 N.E.2d 1246, cert. den., 471 U.S. 1044 (1985); People v. Jones (1982) 94 Ill.2d 275, 447 N.E.2d 161, cert. den., 464 U.S. 920 (1983); Foster v. State (1985) 304 Md. 439, 499 A.2d 1236, cert. den., 478 U.S. 1010 (1986); State v. Coleman (1979) 185 Mont. 299, 605 P.2d 1000, cert. den., 446 U.S. 970 (1980); State v. Price (N.J. Super. 1984) 478 A.2d 1249; State v. Jenkins (1984) 15 Ohio St.3d 164, 473 N.E.2d 264, cert. den., 472 U.S. 1032 (1985); Commonwealth v. Peterkin (1986) 511 Pa. 299, 513 A.2d 373, cert. den., 479 U.S. 1070 (1987); State v. Bell (Tenn. 1988) 745 S.W.2d 858, cert. den., 103 L.Ed.2d 862; Houston v. State (Tenn. 1979) 593 S.W.2d 267, cert. den., 449 U.S. 891 (1980); Johnson v. State (Tex. Crim. App. 1984) 691 S.W.2d 619, cert. den., 474 U.S. 865 (1985); Campbell v. Kincheloe (9th Cir. 1987) 829 F.2d 1453, cert. den., 102 L.Ed.2d 369.)

The Court has established "two separate prerequisites to a valid death sentence. First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. . . . Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his 'character or record and any of the circumstances of the offense.'"

(California v. Brown, supra, 479 U.S. at 541.) These two requirements arguably "are somewhat in 'tension' with each other." (Franklin v. Lynaugh, supra, 487 U.S. ___, 101 L.Ed.2d 155, 171, citing California v. Brown, supra, 479 U.S. at p. 544 (O'Connor, J., conc.).)

California's law is not unconstitutional because it provides that the jury "shall" determine penalty by

application of the weighing process. The Court upheld use of a mandatory weighing process in Proffitt v. Florida (1976) 428 U.S. 242. Florida interpreted its statute as compelling a death judgment in the absence of mitigating circumstances.

(Barclay v. Florida, supra, 463 U.S. 939, 961-962, citing Cooper v. State (1976) 336 So.2d 1133, 1142 (Stevens, J. conc.); see also Woodson v. North Carolina (1976) 428 U.S. 280, 315 (Rehnquist, J. dis.);

Roberts v. Louisiana (1976) 428 U.S. 325, 362, fn. 8 (White, J. dis.).) When this Court again approved Florida's statute in

Barclay v. Florida, supra, that state still interpreted its statute as establishing a rebuttable "presumption" of death. (Barclay v. Florida, supra, 463 U.S. at pp. 961-962, citing Williams v. State (1980) 386 So.2d 538, 543 (Stevens, J. conc.).)

Ironically, the Court in Proffitt rejected the argument made by petitioner that the Florida weighing process was unconstitutional because it gave the trier of fact too much discretion. (Proffitt v. Florida, supra, 428 U.S. at pp. 254, 257.) In a concurring opinion, Justice White, joined by the Chief Justice and Justice Rehnquist, noted that Florida law required the trier of fact to impose the death penalty on all first-degree murderers where the statutory aggravating factors outweighed the mitigating factors, a provision which assured that the death penalty would not be imposed "freakishly or rarely," in violation of Furman. (Id., at pp. 260-261 (White, J., conc.).)

The Texas procedure upheld in Jurek similarly required the jury to return a death sentence if it affirmatively answered all three statutory

questions, and likewise required the jury to return a life sentence if the answer to any question was no. (Jurek v. Texas (1976) 428 U.S. 262, 269.) The concurrence in Jurek noted that the sentencer "must" impose the death penalty if it answered the questions affirmatively and that the statute did "not extend to juries discretionary power to dispense mercy. . . ." (Id. at p. 279 (White, J. conc.)); see also Woodson v. North Carolina, supra, 428 U.S. at p. 315 (Rehnquist, J. dis.); Roberts v. Louisiana, supra, 428 U.S. at p. 359 (White, J. dis.); see Lowenfield v. Phelps (1988) 484 U.S. ___, 98 L.Ed.2d 568, 582 (noting that the Texas statute upheld in Jurek "required" the jury to impose death so long as it answered affirmatively the three statutory questions).)

The Court approved the statute in Jurek because it narrowed the class of

death-penalty eligible murderers and because it permitted the sentencer to consider all mitigating circumstances. (Jurek v. Texas, supra, 428 U.S. at pp. 270-276 (Stewart, J. plur.)) Franklin v. Lynaugh, supra, reaffirmed the constitutionality of Texas' death penalty scheme on the assumption that the statute permitted consideration of all mitigating evidence. (Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at 169-171 (White, J. plur.), 172 (O'Connor, J. conc.))^{17/}

17. Penry v. Lynaugh, supra, ___, U.S. ___, 57 U.S.L.W. 4958, implicitly reaffirmed the constitutionality of the requirement that Texas juries determine penalty solely by its answers to the three Texas special issues.

Since a jury under Texas law is required to return the penalty determined by its answers to the three Texas special issues, where particular mitigating evidence does not readily fit within the three special issues, a defendant may be entitled to instructions ensuring jury consideration of all relevant mitigating evidence under Texas law. (Id.) Penry cannot be extended to other states, including

The Court upheld California's 1977 and 1978 death penalty statutes in Pulley v. Harris, supra, 465 U.S. 37, 53, and California v. Ramos, supra, 463 U.S. 992, 1005-1006, and fn. 19, because the class of death eligible defendants was narrowed, while the statutory list of relevant factors suitably directed and limited jury discretion, while permitting consideration of any relevant mitigating evidence.^{18/} This conclusion was

California, which already permit full consideration of all relevant mitigating evidence.

18. Petitioner was tried under the 1978 law. Although technically the Court upheld the 1977 statute in Pulley v. Harris, supra, and the 1978 statute in Ramos, there is no significant difference between the two statutes in terms of jury sentencing discretion. The California Supreme Court has construed the 1978 statute such that it "does not operate less favorably to [defendants] than the 1977 version" (People v. Murtishaw (1989) 48 Cal.3d 1001, 1025), and has repudiated the suggestion "that the two laws offer substantially disparate sentencing discretion." (People v. Murtishaw, supra, 48 Cal.3d at p. 1029.)

reaffirmed by the Court in California v. Brown, supra, 479 U.S. 538, 540 (fn. *).

Indeed, in California v. Brown, supra, 479 U.S. 538, in which the jury likewise received the unadorned factor (k) instruction and the same "shall" instruction, this Court characterized the instructions as a whole as telling the jury "to consider the aggravating and mitigating circumstances and to weigh them in determining the appropriate penalty."

(Id., at p. 540; emphasis added.) The words "appropriate penalty" were this Court's characterization of the import of the instructions, since the words "appropriate penalty" no more appeared in the actual words of the instructions given in Brown than here.

California's procedure properly restricts and channels jury discretion, which can serve the "useful purpose" of precluding consideration of extraneous

emotional factors unrelated to the evidence. (See California v. Brown, supra, 479 U.S. at p. 543.) It also provides a specific procedure (weighing aggravation against mitigation), which ensures that the death penalty will be imposed "with regularity," rather than "freakishly or rarely." (Proffitt v. Florida, supra, 428 U.S. 242, 260 (White, J. conc.); Jurek v. Texas, supra, 428 U.S. at pp. 278-279 (White, J. conc.).)

California's procedure serves to "minimize the risk of wholly arbitrary and capricious action." (Gregg v. Georgia, supra, 428 U.S. 153, 188-189; see also Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at 170-171; Zant v. Stephens, supra, 462 U.S. 862, 874.) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice

or emotion." (Gardner v. Florida, supra, 430 U.S. 349, 358.) "[T]his court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." (Caldwell v. Mississippi, supra, 472 U.S. 320, 329, fn. 2, & 349 (Rehnquist, J., dissenting).)

California's procedure also promotes the rational and predictable administration of death penalty laws. (California v. Brown, supra, 479 U.S. at p. 541.) By requiring the jury to return a sentence consistent with its application of the weighing process, California law provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (Furman v.

Georgia, supra, 408 U.S. at 238 (White, J. conc.).) It also fosters reliability and furthers judicial review. (California v. Brown, supra, 479 U.S. at p. 543.)

At the same time, California's procedure permits the jury to consider any mitigating evidence which a defendant may offer, thereby permitting the jury to express its "reasoned moral response" to all the evidence before it. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at 4965 (plur. opn.); see Argument I, supra.)

Petitioner argues that the Constitution mandates that the jury make two separate determinations: aggravation outweighs mitigation and a separate and independent determination that death is the "appropriate" penalty.

Petitioner's argument assumes that in performing the statutorily prescribed weighing process the jury

simply mechanically weighs factors, devoid of any "individualized assessment of the appropriateness of the death penalty" required by the Eighth and Fourteenth Amendments. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at p. 4692.)

Petitioner's argument is premised on an erroneous construction of California law. The California Supreme Court has specifically rejected petitioner's "mechanical" analysis of California's weighing process, and has held that each juror "is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor 'k' as we have interpreted it." (People v. Brown, supra, 40 Cal.3d at p. 541.) By weighing the various factors, the jury "simply determines under the relevant evidence which penalty is appropriate in the

particular case." (People v. Brown, supra, 40 Cal.3d at p. 541, fn. omitted; see also People v. Allen (1986) 42 Cal.3d 1222, 1277, cert. den., 101 L.Ed.2d 977 (1988); People v. Hendricks (1988) 44 Cal.3d 635, 650-651, cert. den., 102 L.Ed.2d 236 (1988).)

In the instant case, the majority of the California Supreme Court explicitly rejected the notion that the jury must go through "two separate assessments" under California law in order to exercise its moral judgment as to the "appropriate" penalty. Instead, the jury "makes its appropriateness determination during its normative weighing process." (People v. Boyde, supra, 46 Cal.3d at p. 254.)

Petitioner's contention is not only based on an erroneous understanding of California's weighing process, but it finds no support in any decision of this

Court. Petitioner argues that the Court has repeatedly recognized that "the constitutional bottom line" is whether death is "the appropriate" sentence under all of the evidence, and that the sentence should reflect a "reasoned moral response to the defendant's background, character, and crime," citing Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at 4962, and Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at 172 (conc. opn.), quoting California v. Brown, supra, 479 U.S. at p. 545 (O'Connor, J., conc.). (Petitioner's Brief, p. 25.)

The Court has never held that the jury is constitutionally required to make a separate determination of "appropriateness" apart from the state's statutorily prescribed process, which is petitioner's argument. To the contrary, under both the Texas procedure upheld by the Court in Jurek and the Florida

procedure upheld in Proffitt, the appropriateness of the penalty was determined solely as part of the statutorily mandated process, and was not a separate determination. (See Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at p. 169, (petitioner's contention that the jury should have been instructed that, even if its answers to the Texas special questions were "Yes," it was still entitled to cast an "independent" vote against the death penalty was "foreclosed by Jurek").)

Moreover, as the plurality noted in Franklin v. Lynaugh, supra, 487 U.S. at ___ (n. 12), 101 L.Ed.2d at 171 (n. 12), a capital jury deliberating at the penalty phase whether the circumstances in aggravation outweigh those in mitigation "is aware of the consequences of its answers. . . ." The jury here obviously

knew that by giving greater weight to the evidence in mitigation it could return a sentence of life without parole. The prosecutor recognized this possibility in his argument. (RT 4825; J.A. 30.)^{19/}

Moreover, under factor (a) the jury is free to consider any mitigating circumstances inherent in the crime itself or in the special circumstances, since factor (a) is not labeled as either aggravating or mitigating. Thus, in deciding the relative weight of this factor, the jury will automatically decide the sufficiency of the aggravation.

19. At the Penal Code section 190.4, subdivision (e) hearing on the motion for modification of penalty, defense counsel praised the jury for having carefully considered all the evidence before it, noting that the jury "took the night off to see if it really set with them" before returning their death penalty verdict, which counsel characterized as "a singularly human" and "very good thing for them to do under the circumstances." (RT 4883.)

Petitioner's argument is an unwarranted extension of this Court's jurisprudence. Giving a jury absolute discretion to determine penalty once the class of death penalty eligible defendants has been constitutionally narrowed is constitutionally tolerable (Gregg v. Georgia, supra, 428 U.S. 153; Zant v. Stephens, supra, 462 U.S. 862), but the Court has never held that it is constitutionally mandated. (Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at p. 170.)

Petitioner's argument would engraft a third requirement of "unbridled discretion" for sentencers. To do so would improperly intrude into California's procedure for channeling and guiding sentencer discretion that is part of California's "effort to achieve a more rational and equitable administration of the death penalty." (Franklin v. Lynaugh,

supra, 487 U.S. ___, 101 L.Ed.2d 155, 170.)

As recently as 1988, the Court held that the Constitution "requires no more" than that death penalty statutes "narrow[] the class of death-eligible murderers and then at the sentencing phase allow[] for the consideration of mitigating circumstances and the exercise of discretion." (Lowenfield v. Phelps, supra, 484 U.S. ___, 98 L.Ed.2d 568, 583.)

The Court has never indicated that the states must guide the exercise of discretion in a certain way or, as petitioner apparently contends, permit that exercise of discretion to be unbridled in determining the "appropriate" penalty. As recently noted in Franklin v. Lynaugh, supra, the Court "has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence

must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty." (Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at p. 170.) "Much in our cases suggests just the opposite." (Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at 170; see also Baldwin v. Alabama (1985) 472 U.S. 372, 374 (upholding the constitutionality of a "peculiar and unusual" statutory scheme); Turner v. Murray (1986) 476 U.S. 28 (in upholding the Virginia death penalty law which allows the sentencer to reject the death penalty if there are aggravating circumstances present, but no mitigating circumstances, the plurality noted that "Virginia's death-penalty statute gives the jury greater discretion than other systems which we have upheld

against constitutional challenge." (Id., at p. 34, citing Jurek v. Texas (White, J. plur.).)

Moreover, how, under petitioner's theory, would the jury make the determination that "death is the appropriate penalty" apart from the weighing process? If the jurors were only considering factors already encompassed by factors (a) through (k), a determination of appropriateness separate and apart from the weighing process would be meaningless. There would thus be a substantial risk that the jury was making its determination of "appropriateness" based on the same kind of arbitrary and capricious considerations which led to the Court's decision in Furman. As the California Supreme Court has observed, to instruct penalty phase jurors that they may ignore the outcome of the "weighing process" "comes perilously close to violating the

mandate of [Furman] that the jurors must be given specified standards or guidelines within which to focus their discretion

. . . [and] would invite arbitrary decisions based on improper or irrelevant sentencing considerations"

(People v. Hendricks, supra, 44 Cal.3d 635, 654; see also State v. Ramseur (1987) 106 N.J. 123, 524 A.2d 188, 287 (fn. 81) (petitioner's argument would "undermin[e] the principle, also constitutionally mandated, that the death sentence be meted out in a manner that is not arbitrary or capricious."); State v. Tichnell (1986) 306 Md. 428, 509 A.2d 1179, 1199, cert. den., 479 U.S. 995 (1986), reh. den., 479 U.S. 1060 (1987) (" . . . there would be no principled or rational way to differentiate the few cases in which the death penalty is justified from the many in which it is not.").)

Petitioner's argument that California's procedure is unconstitutional because the jury must consider appropriateness within the context of the weighing process, rather than as a separate and independent determination, twists this Court's jurisprudence inside out. He transforms permission to have "unbridled discretion" into a prohibition of any channeling of sentencer discretion whatsoever. In doing so, he advocates a third constitutional requirement of a separate and independent determination of "appropriateness" that will preclude legitimate state efforts to direct and guide sentencers in a rational and equitable fashion.^{20/}

20. The fallacy of petitioner's argument is shown by his revealing reliance on Winston v. United States (1899) 172 U.S. 303, for the proposition that requiring a separate and independent determination of appropriateness, i.e. whether the sentence is "just and wise," would be simply building on a foundation of

Petitioner's further contention that the Constitution requires that the jury be given the right to make an assessment of the "absolute weight of the aggravating circumstances," is equally unsound.

California law requires, on its face, only that aggravation outweigh mitigation, and does not require that aggravation attain any particular "absolute weight." (Pen. Code, § 190.3.) See People v. Hendricks, supra, 44 Cal.3d at p. 654 (jury under California law is to

decisions by the Court "nearly a century old." (Petitioner's Brief, pp. 33-34.) Winston was decided at a time when juries had absolute and unbridled discretion in the determination of punishment, and could make penalty determinations based upon such factors as "sex" and untethered "sympathy." (Id., at pp. 312-313.) Until Furman, statutes generally left the matter of penalty to the absolute discretion of the jury. (McGautha v. California (1971) 402 U.S. 183.) Acceptance of petitioner's position would overturn Furman and all that has been decided by the Court since Furman.

weigh the applicable aggravating and mitigating factors and, "on that basis, and that basis alone, to determine whether death is an appropriate penalty."

(Emphasis in original.) Under California law the prosecution is not required to prove that aggravation outweighs mitigation "beyond a reasonable doubt," or to any particular degree. (People v. Bonillas (1989) 48 Cal.3d 757, 790; People v. Jennings (1988) 46 Cal.3d 963, 992, mod. 47 Cal.3d 277a, cert. den., 103 L.Ed.2d 862 (1989); People v. Gates (1987) 43 Cal.3d 1168, 1201, cert. den., 100 L.Ed.2d 236 (1988); People v. Rodriguez (1986) 42 Cal.3d 730, 777-779.)

This Court has never held that aggravation must rise to some undefined "absolute weight," just as it has never held that aggravation must outweigh mitigation to any specific degree in order for a state's weighing process to pass

constitutional muster. (Harris v. Pulley, supra, 692 F.2d 1189, 1194-1195 (rev'd on other grounds, Pulley v. Harris, supra, 465 U.S. 37.) The Florida procedure upheld in Proffitt did not provide for anything more than a determination of whether aggravation outweighed mitigation, the same as California's. The Florida statute gave no guidance as to how the mitigating and aggravating circumstances should be weighed in any specific case. (Proffitt v. Florida, supra, 428 U.S. at p. 254 (plur. opn.).) The plurality opinion noted that while the various factors to be considered under Florida law "do not have numerical weights assigned to them," the requirements of Furman "are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus

eliminating total arbitrariness and capriciousness in its imposition."

(Proffitt v. Florida, supra, 428 U.S. at p. 258.)

Moreover, in Zant the Court held that the Constitution is not violated by a capital sentencing scheme that permits unbridled jury discretion once the class of death-eligible defendants has been suitably narrowed. (Zant v. Stephens, supra, 462 U.S. 862, 875; see also California v. Ramos, supra, 463 U.S. at p. 1009, fn. 22.) "In other words, the 1978 California law would not contravene the Eighth Amendment even if it set no standards for the sentencing of defendants already deemed death-eligible." (People v. Rodriguez, supra, 42 Cal.3d at p. 778; emphasis in original; footnote omitted.) It follows that the factors in aggravation need not achieve any prescribed "absolute

weight" in order for California's law to satisfy constitutional requirements.

In reality, petitioner's argument is simply a restatement of his initial argument in a different guise: the Constitution requires that the jury have the right to determine "appropriateness" of the death penalty separate and apart from the weighing process prescribed by California law, if not explicitly as a separate and independent determination of "appropriateness" then as a matter of determining the "absolute weight" of the factors in aggravation.^{21/}

21. Petitioner poses the hypothetical "scenario" where a juror views the circumstances in aggravation as substantial enough to "seriously consider" the death penalty and the mitigating circumstances as not "insubstantial," but not "compelling." He argues that the jury would be "required" to vote for death without having determined it to be "the just and appropriate punishment." (Petitioner's Brief, pp. 35-36.) The hypothetical is fatally flawed. First, it does not

Respondent urges the Court not only to uphold California's statute, but to reaffirm the position it took in Pulley

state whether the juror has applied the weighing process and actually determined that the factors in aggravation outweigh those in mitigation, which is the statutory standard. Second, it assumes that the juror has not exercised any moral judgment in evaluating the factors in aggravation and mitigation or in weighing them against each other, contrary to the requirement of California law. Third, it assumes that a juror who concluded that the circumstances in aggravation outweighed those in mitigation, but who believed that death was not the appropriate penalty would not undertake to reweigh the circumstances in aggravation and mitigation to determine whether the juror really believed, in the exercise of the juror's moral judgment, that the circumstances in aggravation outweighed those in mitigation. Fourth, if a juror did reweigh the circumstances in aggravation against those in mitigation in the exercise of the juror's moral judgment, as required by California law, and finally concluded that the circumstances in aggravation truly did outweigh those in mitigation, nothing in the decisions of the Court requires that such a juror be given the option to determine "appropriateness" separate and apart from the statutorily prescribed weighing process and on that basis to return a sentence of life without parole.

v. Harris, supra, 465 U.S. at p. 45: "To endorse the statute as a whole is not to say that anything different is unacceptable." Indeed, there is no "right way for a State to set up its capital sentencing scheme." (Spaziano v. Florida (1984) 468 U.S. 447, 464.) "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." (Ibid.)

Petitioner and amicus California Appellate Project (CAP) refer to Alameda County cases in which juries were instructed that they could find that the circumstances in aggravation outweighed those in mitigation, but that the "appropriate" sentence was nevertheless life without parole. Petitioner and amicus argue that in more than half of the 15 cases in which juries found that aggravation outweighed mitigation, the

jury returned a verdict of life without parole.

However, such forms of instruction and verdicts would necessarily cause a juror to believe that the weighing function was to be performed separate and apart from a determination of appropriateness. Such jurors would naturally assume that they were first to perform the weighing process as an abstract, mechanical proposition, divorced from any moral assessments, which would only be brought to bear in the second and independent assessment of "appropriateness." The first step of this two step process would involve only the "mechanical" counting of factors. (See People v. Brown, supra, 40 Cal.3d 512, 541.) Where such a procedure is used, a second step would be necessary as a matter of California law in order to assure that the jury exercised appropriate discretion

and moral judgment as part of the prescribed weighing process.

However, this two-step process is neither the rule in California nor constitutionally required. As the California Supreme Court held in the instant case, California juries are not required to make "two separate assessments in arriving at a penalty determination." (People v. Boyde, supra, 46 Cal.3d at p. 254.) Instead, the jury "makes its appropriateness determination during its normative weighing process." (Ibid.) The Alameda County cases cited by CAP do not support the proposition that a jury which makes moral assessments as part of a single weighing process, as did petitioner's, does not make an individualized assessment of penalty and a "reasoned moral response" to all the evidence before it. (Penry v. Lynaugh,

supra, ____ U.S. at ____, 57 U.S.L.W. at 4965 (plur. opn.).)

Alternatively, the Alameda County cases cited by CAP may be viewed as expressions of "mere sympathy," after the jury's initial determination of whether the circumstances in aggravation outweighed those in mitigation. (Cf. California v. Brown, supra, 479 U.S. 538, 542-543.)

What the Alameda County cases do not show is that petitioner's jury did not make an individualized determination of penalty in petitioner's case as part of a single "weighing" process as defined by the California Supreme Court in this and other cases.

Petitioner next argues that the challenged jury instruction cannot be saved by the arguments of counsel, citing Taylor v. Kentucky (1978) 436 U.S. 478, and Carter v. Kentucky (1981) 450 U.S.

540 (fn. *).)^{22/} If the language of California Penal Code section 190.3 is constitutionally valid on its face, without the clarifying gloss subsequently added in People v. Brown, supra,^{23/} it cannot be said that instructing the jury in the same language, as was done here, is constitutionally defective, such that arguments of counsel cannot be considered to determine whether the jury correctly understood its function under the statutory standard.

22. As previously noted (see footnote 18, supra), the 1977 and 1978 versions of California's death penalty law do not differ in substance in the sentencing discretion afforded to juries. (People v. Murtishaw, supra, 48 Cal.3d 1001, 1025, 1029).

23. In People v. Brown, supra, 40 Cal.3d 512, 539, fn. 9, the California Supreme Court held that Penal Code section 190.3 was not unconstitutional on its face. However, it directed that "prophylactic" clarifying language be added in order to prevent any possibility of confusion concerning the jury's function. (People v. Brown, supra, 40 Cal.3d at p. 539, fn. 9, 544, fn. 17.)

Moreover, in California v. Brown, supra, 479 U.S. 538, it was just as true that the language of the instruction was valid on its face, but equally susceptible to clarifying gloss. It was proper to look to the arguments of counsel and the other instructions in that case to determine whether the jury applied a constitutionally invalid standard. (See Id., at p. 546 [O'Connor, J., concurring].) The issue here is not whether the instruction could have been made any clearer, but whether the jury was misled by an instruction which was constitutionally valid on its face, where the arguments of counsel clarified the jury's function under the statute.

The prosecutor made it clear to the jury that the question was one of "weighing", that nothing would tell the jurors "which factors are more important than other factors" or even "what

Moreover, in California v. Brown, supra, 479 U.S. 538, it was just as true that the language of the instruction was valid on its face, but equally susceptible to clarifying gloss. It was proper to look to the arguments of counsel and the other instructions in that case to determine whether the jury applied a constitutionally invalid standard. (See Id., at p. 546 [O'Connor, J., concurring].) The issue here is not whether the instruction could have been made any clearer, but whether the jury was misled by an instruction which was constitutionally valid on its face, where the arguments of counsel clarified the jury's function under the statute.

The prosecutor made it clear to the jury that the question was one of "weighing", that nothing would tell the jurors "which factors are more important than other factors" or even "what

specifically is aggravating or mitigating as opposed to what is not." (RT 4767-4768, J.A. 21.) Far from telling the jurors that they could not exercise any moral judgment in the weighing process, the prosecutor specifically urged the jurors to ask themselves:

"Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty." (RT 4780; J.A. 24.)

He told the jury the question was "should it [the death penalty] or should it not be imposed." (RT 4820; J.A. 28.)

He urged the jury not to make a decision based on the "shifting sand" of mere sympathy, but rather to make a reasoned decision based on a "rational process" of weighing the 11 factors set forth by the law. (RT 4767, 4819, J.A. 21, 27-28.)

He told the jury that they might find that all the factors were in

aggravation, or that they might find that one factor mitigates, and that,

"It is not a process of counting, it is a process of weighing. And you should decide whether or not that one factor in mitigation outweighs all those factors in aggravation and then decide the case." (RT 4825; J.A. 30; emphasis added.)

His last words to the jurors in his rebuttal argument were that they should ask themselves if the case "warrants the death penalty," and "'What would I like to have or not have more that would warrant it one way or the other.'" (RT 4826; J.A. 31; emphasis added.)

Petitioner's counsel also emphasized the jurors' discretion and the fact that the jury had to make a "qualitative analysis" and not "play a numbers game." The jury had to consider such things as "what causes a man to do what he does," because human beings "are extremely complex." (RT 4785-4787; J.A. 25.) He told the jurors they must look at

"the totality" of petitioner, that if the jurors treated the weighing process as a "mechanical process" they would "miss the whole thrust of it," and that they were free to find that the "catchall" factor (k) outweighed all the other factors. (RT 4789, 4829-4831; J.A. 26, 31-33.)

The California Supreme Court correctly concluded that the jury was not misled concerning its weighing function. (People v. Boyde, supra, 46 Cal.3d at pp. 253-255.)

Petitioner argues that other portions of argument of the prosecutor, as well as statements during the voir dire examination of certain jurors, misled the jurors.

Not only should voir dire statements of counsel not be considered in determining whether a jury correctly understood the penalty phase instructions given by a court (see Argument I, supra),

but petitioner again takes the prosecutor's voir dire remarks out of context and misconstrues their import. Thus, the prosecutor told Mr. Armas that the law provided "a very strict structure" and a list of "about nine or ten factors" for the jury to look at in deciding penalty, and that it was quite possible that if he were "writing the law" himself "on a blank slate," he might not think the death penalty was "appropriate, but yet the law says that it is." (RT 1159; J.A. 9.) This questioning was in the context of determining that the prospective juror would "apply that law even if you disagree with that law in a particular case," rather than each juror "debating whether they like the law or not like the law." (RT 1158-1159; J.A. 9.) The prosecutor was talking about the "appropriateness" of how the law was drafted.

The prosecutor similarly told Ms. Ash that under the prior law the jury could "decide for whatever reason they wanted" whether "to give the death penalty or life without possibility of parole" and that there were "no guidelines at all" under the former law. He referred to the "nine or ten factors" set forth in current law and the need to determine whether aggravation or mitigation outweighs. He stated his concern was "we could get twelve different ideas as to what the standard should be or what the law should be," and that "we can't spend days, years, tens of years trying to figure out if we like the law and if we are going to apply it." He suggested that if she had it to do personally, she "might not write the law that way," but that when she looked at the "factors" she might be "required to return a penalty of death." He asked her if she could put aside what "you

personally feel" and "follow the law even in that situation." (RT 1976-1977, J.A. 17-18.)

As the California Supreme Court correctly concluded, each statement

"was a result of the prosecutor's contrasting the current death penalty law with the former one that was unconstitutional for lack of standards governing the jury's exercise of discretion in sentencing. (See Furman v. Georgia (1972) 408 U.S. 238 [33 L.Ed.2d 346, 92 S.Ct. 2726].) He was attempting to explain that the current law does not leave jurors 'rudderless,' but instead provides concrete standards to guide the jury's exercise of discretion." (People v. Boyde, supra, 46 Cal.3d at p. 254, fn. 6.)

In argument, the prosecutor properly told the jury that the test was simply "whether aggravating outweighs mitigating or mitigating outweighs aggravating," and that "it can be a slight outweigh." (RT 4767; J.A. 20-21.) The prosecutor correctly noted that under California law, "There is no requirement

that I have to prove that the aggravating outweighs beyond a reasonable doubt, beyond clear and convincing evidence," or any other such standard. It was "merely a question of weighing." (RT 4767; J.A. 21; emphasis added.)

These were not statements which in any way "improperly described the role assigned to the jury by local law." (Dugger v. Adams (1989) 489 U.S. ___, 103 L.Ed.2d 435, 443, citing Caldwell v. Mississippi, supra, 472 U.S. 320; see also Darden v. Wainwright, supra, 477 U.S. 168, 184, fn. 15.) There is no requirement under California law that aggravation must outweigh mitigation by any particular degree, such as beyond a reasonable doubt. (People v. Bonillas, supra, 48 Cal.3d 757, 790; People v. Jennings, supra, 46 Cal.3d 963, 992; People v. Gates, supra, 43 Cal.3d 1168, 1201; People v. Rodriguez, supra, 42 Cal.3d 730, 777-779.) The

California Supreme Court has held that there is no misstatement of California law when a prosecutor informs the jury that it is to weigh the applicable aggravating and mitigating factors and, "on that basis, and that basis alone, to determine whether death is an appropriate penalty." (People v. Hendricks, supra, 44 Cal.3d 635, 654; emphasis in original.) The prosecutor's statement here in no sense incorrectly diminished the sense of the jury's true responsibility under California law; it accurately stated the precise nature of that responsibility.

Finally, even assuming, arguendo, that there was any federal constitutional error in either of the instructions, it was harmless under the circumstances of the case. (Chapman v. California (1986) 386 U.S. 18, 24; Satterwhite v. Texas (1988) 486 U.S. 249.) In Hitchcock v. Dugger (1987) 481 U.S.

393, 399, the Court implied that the sentencer's failure to consider mitigating evidence under Skipper, Eddings and Lockett, may be harmless error. (See also People v. Hamilton, supra, 46 Cal.3d 123, 148-149, cert. den., ___ U.S. ___, 103 L.Ed.2d 238 (1989)(applying Chapman test where jury was misled into believing it could not consider defendant's mitigating evidence under factor (k), and finding error harmless); People v. McLain (1988) 46 Cal.3d 97, 109, cert. den., ___ U.S. ___, 103 L.Ed.2d 824 (holding Skipper error harmless under Chapman test); People v. Guzman, supra, 45 Cal.3d 915, 958, cert. den., ___ U.S. ___, 102 L.Ed.2d 1005 (1989) (any factor (k) error was harmless under Chapman).) (Cf. People v. Brown (1988) 46 Cal.3d 432, 446-449, cert. den., ___ U.S. ___, 103 L.Ed.2d 597 (1989) (distinguishing between the test of prejudice applicable to state law errors

occurring at the guilt phase of trial, and, as a matter of state law, applying a "reasonable possibility" test of prejudice to penalty phase error which does not amount to federal constitutional error).)

In petitioner's case, the evidence in aggravation was overwhelming, while the mitigating evidence was anemic and pales in comparison. If it were necessary for the Court to reach the issue, any asserted federal constitutional error could and should be held harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. 18, 24; Satterwhite v. Texas, supra, 486 U.S. 249. However, respondent emphasizes that in its view there was no federal constitutional error in the instructions.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California should be affirmed.

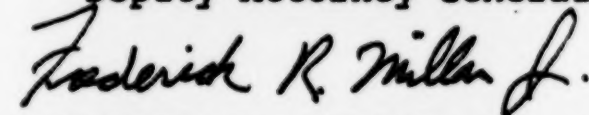
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD BOYDE,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
California Supreme Court

PETITIONER'S REPLY BRIEF

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I. THE JURY INSTRUCTION (SINCE ELIMINATED) PRECLUDING THE JURY'S CONSIDERATION OF RELEVANT MITIGATING EVIDENCE NOT IMMEDIATELY RELATED TO THE CRIME VIOLATED THE EIGHTH AMENDMENT RULE OF *LOCKETT V. OHIO* AND ITS PROGENY.

At the penalty stage of his capital trial, petitioner introduced considerable evidence in mitigation that was not immediately related to his crime. This included a difficult and deprived childhood, unsuccessful efforts to obtain help for his intellectual deficiencies and psychological problems, and his redeeming personal qualities—that he was a hard worker, a good husband and father, a kind and generous person. Respondent does not dispute that the sentencing instructions precluded the jury from considering this evidence unless the evidence fit within one of the specified categories of circumstances to which the jury's penalty deliberations were restricted. Nor does respondent claim that petitioner's mitigating evidence could have fit within any of the specified categories other than the one defined by the now-defunct factor (k) instruction. Thus, the *Lockett* issue in this case boils down to the question whether the factor (k) instruction would have been understood by the jury as permitting consideration of all of petitioner's mitigating evidence.¹

¹ Respondent does not dispute that petitioner was constitutionally entitled to have this evidence considered in mitigation. Every member of this Court has endorsed the view that mitigating evidence unrelated to the crime for which a capital defendant is being sentenced must be considered. See *South Carolina v. Gathers*, 490 U.S. —, 104 L.Ed.2d 876, 887 (1989) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (White, J., joined by Brennan, Marshall, Blackmun, Stevens, and O'Connor, JJ.); *Penry v. Lynaugh*, 492 U.S. —, 106 L.Ed.2d 256, 303 (1989) (Scalia, J., joined by Rehnquist, C.J., White and Kennedy, JJ., dissenting) (citing *Hitchcock v. Dugger*, 481 U.S. 393 (1987) and *Skipper v. South Carolina*, *supra*).

Respondent does assert that the constitutionality of the former factor (k) instruction was decided adversely to petitioner in *Califor-*

Respondent claims that it would. The following subsections respectively demonstrate (a) that respondent's interpretation of the factor (k) instruction is incompatible with the language of the instruction; (b) that the context of the instruction would not permit it to be read as encompassing petitioner's mitigating evidence; (c) that other instructions did not cure the unconstitutionally narrow factor (k) instruction; and (d) that the arguments of counsel did not do so.

A. Respondent's Reading Of The Former Factor (k) Instruction Is Belied By The Instruction's Plain Language.

Respondent claims that the former factor (k) instruction was a "catchall" that allowed petitioner's jury to consider his mitigating evidence. RB 14, 29, 41 n. 12. The plain words of the instruction belie this claim. The instruction permitted the jury to consider only evidence "which extenuates *the gravity of the crime* even though it is not a legal excuse for *the crime*."² This language might have been understood to be a catchall for *crime-related* mitigation, but it would not reasonably have been interpreted as a catchall for mitigation *extraneous* to the crime.³

nia v. Ramos, 463 U.S. 992, 1004 n. 19 (1983). But no issue concerning the validity of factor (k) was before the Court in *Ramos* (or in any other decision of the Court), nor was the Court called upon to determine whether a jury instructed under factor (k) before *People v. Easley* would understand the scope of mitigation to cover the kinds of mitigation that petitioner offered.

² It is not surprising that the factor (k) instruction failed to convey the proper range of mitigating factors because the statutory language that it tracked, see Cal. Penal Code, § 190.3(k), was irrevocably set in an initiative measure finalized before this Court's decision in *Lockett v. Ohio*, 438 U.S. 586 (1978).

³ That reasonable jurors would understand the language of the former factor (k) instruction as precluding consideration of non-crime-related mitigation is confirmed by the fact that this interpretation was widespread among prosecutors and judges throughout the

A reasonable juror would surely not think that the "gravity of the crime" committed by petitioner was in any way lessened by the fact that petitioner was a person of value,⁴ that he was kind to his family and friends, or that he had intellectual handicaps and a history of childhood deprivation. Such evidence is, as members of this Court have recognized, "extraneous to the crime itself" and not "directly relevant to" it. *South Carolina v. Gathers*, 104 L.Ed.2d at 887 (O'Connor, J., dissenting). The evidence may indeed have called for a sentence less than death, but it did so *in spite of* the gravity of the crime. Thus, factor (k) provided no vehicle for the jury to consider this evidence in mitigation.

Respondent asserts that because the jury had been told at the outset of the penalty instructions that it would now have to determine petitioner's penalty, the jury would have interpreted "the gravity of the crime" to mean "the appropriate penalty," RB 33. This assertion is insupportable. First, despite respondent's efforts to portray it in a different light, the earlier language was merely a general introduction telling the jurors that they would have to choose a penalty. RT 4831:22-23. In no way did this instruction inform them as to *what* the law would allow them to consider in making the penalty determination. Second, the phrase "gravity of the crime" is simply not equivalent to "appropriate penalty." "Crime" does not mean "punishment." "Gravity" is not a synonym for "appropriateness." There is

state before the instruction was modified by *People v. Easley*, 34 Cal.3d 858 (1983). *Amicus* Brief of the California Appellate Project (hereafter, "CAP *Amicus*") 12-17. Respondent argues that other persons' understandings of the language of factor (k) are irrelevant to how the jury understood factor (k) in petitioner's case. Respondent's Brief (hereafter "RB") 57. But seeing how other reasonable persons interpreted the unadorned words of factor (k) is indicative of how reasonable jurors at petitioner's trial would have interpreted those same words in the factor (k) instruction they received.

⁴ See RT 4820 (prosecutor's argument to penalty jury).

nothing in the introductory instruction that would lead a reasonable juror to conclude otherwise.

B. Far From Supporting Respondent's Argument, The Context Of The Factor (k) Instruction Reinforced The Jury's Understanding That Only Crime-Related Mitigation Could Be Considered.

Respondent argues that the context of the factor (k) instruction expanded its inherent meaning. RB 34-36. To the contrary, the context *reinforced* the message that factor (k) was limited to crime-related mitigation. All of the other enumerated mitigating factors at petitioner's trial were expressly limited to the crime itself, so that a reasonable juror would have concluded that factor (k)'s use of similar wording (extenuating the gravity of "the crime") was likewise limited. See Petitioner's Brief (hereafter "PB") 19-20; CAP *Amicus* 10-12.

Respondent argues that because two enumerated *aggravating* factors—factors (b) and (c), involving prior felony convictions and prior violent crimes—were not related to the circumstances of the crime, factor (k) would likewise be understood to permit consideration of mitigation unrelated to the crime. RB 35-36, 38-39. This is a non-sequitur.

First, these two aggravating factors would be understood from their very terms as applying to matters other than the crime on trial. As a result, if factor (k) also applied to non-crime-related matters, a juror would expect to be alerted to such authorization by that factor's plain words. No such words appear.

Second, factors (b) and (c) allow only two *limited* kinds of background matters to be used in aggravation, i.e., specific instances of prior criminality; they do not allow consideration of general bad character. Thus, they do not open up aggravation in the way that the Constitution requires mitigation to be opened up. The listing of two *specific* kinds of background aggravation in factors (b) and (c) would hardly induce a reasonable juror to conclude that factor (k) allows the jury to consider,

"as a mitigating factor, *any* aspects of defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (emphasis added).

Moreover, there is a qualitative difference between enhancing a sentence on the basis of *specific criminal acts* and ameliorating a sentence on the basis of *general* positive or sympathetic *background traits*. A reasonable juror would view a provision to enhance punishment based on prior crimes to be a natural part of a "tough" and "effective" death penalty law like California's. See Official Cal. Voters Pamp., Gen. Election (Nov. 7, 1978) at 34.⁵ However, a juror would not expect general *non-crime-related* mitigation (such as a defendant's difficult upbringing, low intelligence, value and kindness to his friends and family) to be an inherent feature of such a law. Thus, a juror's understanding that some specific criminal acts could be weighed in aggravation would not, by any natural reasoning process, lead the juror to deduce that a very general kind of background evidence could be weighed as independent mitigation. Certainly, this deduction would not be drawn in the face of an instruction explicitly limiting mitigation to matters that extenuate "the gravity of the crime."

Next, starting from the premise that "there was no prosecution evidence which was not properly considered under the statutory aggravating factors (a), (b) and (c)," respondent argues that "[t]he jury could not have reasonably believed it must ignore *petitioner's* background and character evidence, while giving weight to the *prosecution's* background and

⁵ In determining the meaning or purpose of an initiative measure, California courts have long relied on arguments made by the proponents of the measure in the official voter pamphlet. See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal.3d 208, 245-46 (1978); *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 580-81 (1949); *Carter v. Com. on Qualifications, etc.*, 14 Cal.2d 179, 185 (1939).

character evidence." RB 43, 40. This reasoning is flawed on several levels.

First, contrary to respondent's assertion, the prosecution most certainly *did* adduce aggravating evidence that was not properly considered under any statutory aggravating factor. As the California Supreme Court held below,

[m]ost of the [aggravating] evidence presented about Boyde's CYA commitment and parole falls into this category [of impermissible aggravation]. The same may be said for testimony by officers about Boyde's untruthfulness, possession of stolen property and possession of marijuana in jail. Also improper was testimony by victims of other offenses about the impact that the event had on their lives.

People v. Boyde, 46 Cal.3d 212, 249 (1988).⁶ If the prosecution thus adduced aggravating evidence that plainly fell outside the enumerated factors, a reasonable juror could easily have concluded that defense evidence also lay beyond the scope of those factors.⁷

⁶ The court found that these errors did not require reversal, *id.* at 250, but that finding is immaterial for purposes of the present discussion.

⁷ "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. —, 106 L.Ed.2d 256, 278 (1989); see also *Hitchcock v. Dugger*, 481 U.S. 393, 398-399 (1987), *Eddings v. Ohio*, 455 U.S. 104, 113 (1982), *id.* at 119 (O'Connor, J., concurring), *Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion).

In both *Penry* and *Hitchcock*, the sentencer had heard substantial mitigating evidence. This Court nonetheless reversed, because no provision in the death penalty law as applied at trial permitted the sentencer to give effect to that evidence. Respondent does not attempt to reconcile its current argument with these decisions. Indeed, Respondent's Brief does not attempt to distinguish *Hitchcock* at any point whatsoever.

Second, respondent's argument fails on its own terms. That the aggravating evidence fell within the issues framed for the jury's consideration by the sentencing instructions would not lead a reasonable juror to conclude that all of the defense evidence did, too. The *defense* evidence was of a qualitatively different nature (see *ante*); the factor (k) instruction expressly told the jury that only evidence "which extenuates the gravity of the crime" could be considered; and the prosecutor consistently emphasized to the jury, from voir dire through penalty argument, that the express instructional limitations upon the mitigating evidence which the jury could lawfully consider were strict and specific. See subsection I.D., *infra*.

Next, respondent points to two enumerated mitigating factors, factors (d) and (h), which authorize consideration of "extreme mental or emotional disturbance" and "impaired capacity," and notes that these factors would allow the admission of background evidence of a defendant's history of mental problems. From this, respondent argues that "the jury would have known that it was free to consider petitioner's background and character evidence in determining the appropriate penalty." RB 37. In fact, however, the jurors were specifically instructed to consider this evidence as mitigation under factors (d) and (h) only insofar as it related to the defendant's mental state at the time of "the offense."⁸ Thus, rather than establishing that non-crime-related evidence could be given "independent mitigating weight," *Lockett*, 438 U.S. at 605, the factor (d) and (h) instructions reinforced the notion that only mitigation related to the crime could be considered.

C. Respondent's Reliance On The Instruction To "Consider All Of The Evidence" Distorts The Obvious Purpose Of The Instruction And Is Inconsistent With Precedent.

Respondent claims that the jurors would have understood factor (k) to be a "catchall" for non-crime-related evidence

⁸ The instructions given on factors (d) and (h) were both explicitly so limited. See RT 4832, J.App. 34.

because a separate instruction—not among the eleven enumerated factors—advised the jury to “consider all of the evidence which has been received during any part of the trial of this case.” RB 33-34; see RT 4831:25-26, J.App. 33. But this instruction merely informed the jury to review all the evidence admitted and to consider whether it fell within the eleven enumerated penalty factors. It told the jury the *sources* of the evidence that the jurors could “consider” in determining, for example, whether there were any circumstances which “extenuate[d] the gravity of the crime.” If, however, the evidence did not fit within any enumerated factor because it was unrelated to the crime, the jurors would have understood they could neither weigh it nor give it independent mitigating effect, because they were allowed to weigh and give effect only to the eleven factors “upon which you have been instructed.” RT 4836:7-9, J.App. 35.

In both *Lockett v. Ohio* and *Penry v. Lynaugh*, *supra*, this Court found that a sentencer’s ability to respond to mitigating evidence was unconstitutionally curtailed despite the fact that the sentencer was authorized to consider all the evidence. In neither case was a directive to consider all the *evidence* viewed as altering the scope of the specific *factors* enumerated for the sentencer’s consideration. See PB 23-24, CAP *Amicus* 19 n. 11.

Respondent also notes that the jury was instructed that “extenuate” means “to lessen the seriousness of the crime as by giving an excuse.” RB 32; see RT 4833, J.App. 34. This instruction did nothing to solve the basic problems of the factor (k) instruction. To begin with, the definitional instruction only made factor (k) more convoluted: combining it with the factor (k) instruction yields a directive to the jury to consider “any other circumstance which lessens the seriousness of the crime as by giving an excuse [for] the gravity of the crime even though it is not a legal excuse for the crime.” As the prosecutor told the jury, “[defense counsel] agrees with me [that it] doesn’t make any sense . . .” RT 4815:22-25. Moreover, because the definitional instruction spoke in terms of the seriousness of,

and excuses for, “the crime,” it only reinforced the focus of factor (k) on the crime itself.

D. Respondent’s Fallback Reliance On The Arguments Of Counsel Is Not Only Legally Incorrect But Also Ignores Or Mischaracterizes The Crux Of Those Arguments.

Finally, respondent asserts that the arguments of counsel, particularly the prosecutor, would have led the jury to understand that it could consider non-crime-related mitigating evidence despite the language of the former factor (k) instruction. RB 43-47. Even on its face, respondent’s position is flawed. The factor (k) instruction was explicit in restricting the kind of mitigating evidence that the jury was permitted to consider, and “arguments of counsel cannot substitute for [correct] instructions by the court.” *Taylor v. Kentucky*, 436 U.S. 478, 488-489 (1978).

But by no means did the prosecutor express a view of mitigation that was consistent with *Lockett*. Indeed, his position, repeatedly stated in both voir dire and final argument, was that mitigating factors were distinctly limited.

During voir dire, the prosecutor consistently espoused the view that the factors to be weighed were “strict,” RT 1791, and “specific,” RT 436. See also RT 436, 1159 (J.App. 9), 1280. His arguments at the penalty phase built upon those premises.⁹ There he emphasized that the jurors were limited to the list of

⁹ Respondent asserts that the voir dire remarks were “too far removed” from the penalty instructions to be pertinent, RB 48, citing *Darden v. Wainwright*, 477 U.S. 168, 183 n. 15 (1986). But the remarks at issue in *Darden* were not merely uttered at the guilt phase, they purported to apply only to the guilt phase. By contrast, the prosecutor’s voir dire remarks in petitioner’s case were intended to apply to the penalty determination. Moreover, the prosecutor’s penalty argument specifically reminded the jurors of “the extensive voir dire process” and of the questions that the prosecutor had asked on voir dire concerning their ability to follow the strictures of the law. RT 4778-79.

eleven factors, which he posted on a board. RT 4765, 4766 (J.App. 20), 4768 (J.App. 21), 4821. Then he told the jurors that they could *not* weigh factors such as whether or not petitioner might be rehabilitated or might change, because "it is not one of the factors upon that board, doesn't [sic], not mentioned at all." RT 4819. Also "not a factor" was whether petitioner had been trying to destroy himself out of self-hate. RT 4817. After stating that the jurors were required to try to "completely filter out all [their] emotions, make the decision on a rational basis," RT 4817, J.App. 27, the prosecutor equated virtually all of petitioner's evidence to "things that get people's sympathy," RT 4817-18.

Ultimately, the prosecutor argued that the jury could not even consider petitioner's qualities which made him "someone of value," whose execution would be "a loss to all of us," because that type of consideration "*is not on the list*" of enumerated factors. RT 4820, emphasis added. The prosecutor thus nullified virtually the entire thrust of petitioner's mitigating evidence.¹⁰

¹⁰ Respondent repeatedly asserts that the prosecutor "never suggested that the jury could not consider, as a matter of law, any of petitioner's evidence in mitigation." RB 44, 45, 47. In light of the prosecutor's arguments just quoted in text, this assertion can be dismissed as patently incorrect.

Respondent makes a similar claim about defense counsel's argument, RB 44, but the claim is wrong for the same reason. Defense counsel agreed that all of the matters mentioned by the prosecutor were "not for consideration of factors for the jury [sic]." RT 4827, 4783-84. Elsewhere, respondent purports to quote defense counsel's comment to the jury that factor (k) was "almost a catchall phrase." RB 24 n. 7, 44; see RT 4829, J.App. 31. (Respondent conveniently omits the word "almost.") But defense counsel's acquiescence in the prosecutor's argument that the jury could not weigh whether petitioner was someone of value, RT 4820, 4827, makes clear that counsel was saying only that factor (k) was a catchall for factors relating to the crime itself.

II. THE JURY INSTRUCTION (SINCE ELIMINATED) REQUIRING A VERDICT OF DEATH WHENEVER AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES PRECLUDED THE JURY FROM MAKING A REASONED MORAL JUDGMENT REGARDING THE APPROPRIATENESS OF THE DEATH PENALTY FOR PETITIONER.

The following subsections respectively (a) refute respondent's mistaken imputation that petitioner is arguing for grafting a new and additional procedural requirement upon the capital sentencing process; (b) demonstrate that a range of factual situations exists, including the facts of this case, in which California's former mandatory sentencing instruction results in an unwarranted and unconstitutional death sentence; and (c) reveal the invalidity of respondent's argument that the mandatory sentencing instruction has constitutional virtues.

A. Respondent Mistakenly Imputes To Petitioner An Argument For A New Procedural Requirement On The Capital Sentencing Process.

Respondent repeatedly mischaracterizes petitioner's position¹¹ as urging a new sort of constitutionally required jury instruction to the following effect: "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that death is the appropriate punishment." But this is *not* petitioner's argument.

Petitioner's argument has always been that, to comport with the Eighth Amendment, the penalty jury must be permitted to make a reasoned moral judgment that the death penalty is the

¹¹ For example, respondent asserts that "[p]etitioner argues that the constitution mandates that the jury make two separate determinations: aggravation outweighs mitigation and a *separate* and *independent* determination that death is the 'appropriate' penalty," RB 25; the same tenor of characterization is repeated at RB 78, 81, 86, and 91.

appropriate punishment in a particular case. The various states are free to honor this constitutional command by structuring the jury's penalty deliberations in any manner not inconsistent with it, ranging from the "hands-off" approach upheld in *Zant v. Stephens*, 462 U.S. 862, 880 (1983), to a weighing formula or metaphor that guides the jury's evaluation of the evidence, see *Proffitt v. Florida*, 428 U.S. 242 (1976). Petitioner has *never* argued that the Eighth Amendment requires an affirmative instruction to the effect that "you must not return a death sentence unless you make a separate and independent finding that it is the appropriate penalty in light of all the circumstances."¹² Rather, the constitutional bottom line on which petitioner's modest argument rests is simply that the state may not impose a procedure or instruction which *conflicts* with and *constrains* the jury's capacity to render its penalty decision consistent with its reasoned moral response to the evidence.

Specifically, petitioner objects to the mandatory, mechanistic sentencing instruction given at his trial on the ground that it unconstitutionally confined the jury's penalty deliberations in such a way as to *forbid* the jury to make the reasoned moral response that the Eighth Amendment requires. This unconstitutional restriction could have been eliminated simply by substituting the permissive verb "may" for the mandatory directive "shall," as was done in Alameda County with the effects described in the CAP Amicus at pages 27-29. The California Supreme Court has, of course, undertaken a more extensive repair of the defective instruction in *People v. (Albert) Brown*, 40 Cal.3d 512 (1985); but petitioner is not arguing that *Brown's* particular solution to the problem is constitutionally compelled.

¹² An instruction of that nature would of course be one permissible way to cure the constitutional vice that infected petitioner's penalty trial. Similar instructions are in fact used in other states, see e.g., *State v. McDougall*, 301 S.E.2d 308, 327-328 (N.C. 1983); *State v. Ramseur*, 524 A.2d 188 (N.J. 1987).

Respondent's mischaracterization of petitioner's position must therefore be put aside as a distraction from the reality of this case. The former mandatory sentencing instruction is unconstitutional because it intrudes upon and conflicts with the well established core of this Court's Eighth Amendment jurisprudence, not because it fails to include some new and additional constitutional right recently concocted by petitioner. There are two minimum standards that a state must meet in structuring its capital sentencing process: (1) it must establish narrowing criteria which distinguish capitally eligible cases from the mass of noncapital murders; and (2) it must permit the defendant to introduce, and permit the sentencer to consider, all relevant evidence in mitigation. Beyond these two affirmative requirements, there are certain things that a state must *refrain* from doing. For example, a state may not inject the issue of race into the process by specifying the race of the victim as a factor to be considered in aggravation. Similarly, the state must refrain from forbidding the sentencer to make a reasoned moral judgment as to whether "death [is] an appropriate sentence," *Sumner v. Shuman*, 483 U.S. 66, 80 (1987), after considering all of the relevant sentencing evidence. Petitioner seeks only to rectify a jury instruction given at his trial which had this latter effect, not to graft any new tests, procedures, instructions, or other paraphernalia onto the capital sentencing process.¹³

B. Respondent Ignores The Realistic Risk That California's Former Mandatory Sentencing Instruction Required The Jury To Impose A Death Sentence In Cases In Which The Jury Did Not Conclude That Death Was The Appropriate Punishment.

At page 29 of his brief, petitioner proffered an illustrative scenario to show how a jury instructed that "[i]f you conclude

¹³ Thus, petitioner's position is distinguishable from that cited by respondent, RB 79, and rejected in *Franklin v. Lynaugh*, 487 U.S. —, 101 L.Ed.2d 155, 169 (1988) that the petitioner was entitled to a separate jury instruction authorizing the jury to cast an "independent" vote against the death penalty regardless of its answers to the Texas penalty questions.

that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death" would be compelled to return a death verdict in situations where the jury's reasoned moral response to the evidence was that the aggravating circumstances fell short of calling for a death sentence and that the mitigating circumstances, considered in the light of the aggravating circumstances, were sufficient to warrant a life sentence. Respondent purports to find fatal flaws in this scenario. RB 91 n. 21.

Respondent urges that "first, [the scenario] . . . does not state whether the jury has applied the weighing process and actually determined that the factors in aggravation outweigh those in mitigation, which is the statutory standard." To the contrary, the scenario *does* suppose that the jury has applied the weighing process and that the mandatory instruction has nevertheless compelled it to impose a death sentence in a case in which, without the instruction, the jury would *not* conclude "that death is the appropriate punishment in the specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This assumption, moreover, is well founded.

Take, for example, a case in which the circumstances of the crime and the other aggravating circumstances relied on by the prosecution present a picture of substantial aggravation but not of aggravation so extreme that the case calls compellingly for a death sentence. Suppose that in this case only one type of evidence is presented in mitigation—evidence regarding the defendant's good and nonviolent institutional adjustment during a prior prison term and while in custody awaiting the capital trial. This type of evidence is unquestionably cognizable in mitigation. *Skipper v. South Carolina*, 476 U.S. at 4-5. While a rational jury would certainly find that good institutional adjustment was a factor to be considered in mitigation in the penalty determination, it defies reality to think that the same rational jury would find that the prognosis of good prison performance (hardly an exalted avocation) would *outweigh* the taking of human life inherent in the capital murder.¹⁴ However,

¹⁴ Under California law and jury instructions, the circumstances of the offense are explicit aggravating factors which the jury must consider in determining the penalty.

it is entirely possible that the jury would conclude that, although aggravation outweighed mitigation in any ordinary sense, the defendant's evidence of good institutional adjustment was more than sufficient to justify a life sentence as a reasoned moral response to the evidence. Indeed, penalty juries often take a very practical view of the penalty choice and see the defendant as a walking disaster on the street but a redeemable risk in prison. However, under California's former mandatory sentencing instruction, no amount of *Skipper* mitigation could *ever* lawfully result in a life verdict because of the inherent disparity between the mitigating weight attached to even the very best of prison conduct compared with the inherent weight of even the least aggravated of capital murders. Respondent's suggestion that any case in which a jury could find that life instead of death is the appropriate sentence is *eo ipso* a case in which the jury would also find that mitigation "outweighs" aggravation is, quite simply, wrong.

Petitioner's own case presents a less obvious but equally valid example of a situation in which the jurors could have felt obligated by the court's instructions to return a death sentence that was *inconsistent* with their reasoned moral response to the aggravating and mitigating evidence. The jurors in petitioner's case could have reacted to the aggravating evidence by concluding that, while substantial, it did not demand the imposition of the death penalty because the evidence of petitioner's criminal history revealed petitioner as a man who was very much an *atypical* criminal—a robber whose crimes demonstrated a solicitude for the victims that is not usually found in the typical robbery scenario, as well as an ambivalence about his criminal conduct.¹⁵

¹⁵ Consider the evidence. The victim of the July 1976 robbery testified that when he was obviously upset during the course of the offense, petitioner tried to calm the victim down with conversation and later offered him a cigarette. RT 2344. The victim of the 1981 robbery testified that petitioner tried to explain the reason for the robbery during the course of the offense and later asked the victim if he was hungry and bought him a doughnut. RT 2401-06. Petitioner

Because of petitioner's atypical conduct during these prior robberies, the jury could have found the aggravating evidence insufficient to call for the death penalty, in the light of petitioner's other mitigating evidence relating to the pervasive deprivations which afflicted his upbringing and which he made definite efforts to overcome. However, this conclusion might well *not* take the form of a finding that mitigation "outweighed" aggravation. Instructed that it *must* return a death verdict if aggravation "outweighed" mitigation, petitioner's jury would thus have felt compelled to sentence him to die even though the jury's *reasoned moral response* to all the pertinent evidence was that life was the appropriate sentence.

Respondent next asserts that petitioner's illustrative scenario "assumes that the jury had not exercised any moral judgment in evaluating the factors in aggravation and mitigation or in weighing them against each other, contrary to the requirement of California law." RB 92. Respondent appears to be confounding "the requirement of California law" as subsequently explicated in *People v. Brown*, *supra*, with the instructional rules given in pre-*Brown* cases. What petitioner assumes is that the jury did not exercise any moral judgment in conformity with the requirement of California law *later* articulated in *People v. Brown*, *supra*. While *Brown* now permits the jury to exercise moral judgment in evaluating and weighing aggravating and mitigating factors, petitioner's jury labored under the unadorned mandatory instruction. Petitioner's whole point is that the categorical pre-*Brown* mandatory sentencing instruction *precluded* the jury from making a reasoned moral response to the overall evidence in aggravation and mitigation. Respondent's attempt to finesse the problem by invoking California's subsequent repair of the problem must be rejected.

also told him that petitioner was pretty sure he would get caught, and when he told petitioner that he would *not* give the police a false description, petitioner simply kept walking down the street with him.

Respondent further criticizes petitioner's scenario because "it assumes that a juror who concluded that the circumstances in aggravation outweighed those in mitigation, but who believed death was not the appropriate penalty, would not undertake to *reweigh* the circumstances in aggravation and mitigation to determine whether the jury really believed in the exercise of the juror's moral judgment, that the circumstances in aggravation outweighed those in mitigation." RB 93; emphasis in original. In other words, respondent criticizes petitioner's assumption that jurors would not finagle their figures to reach a desired bottom-line outcome. Respondent again correctly identifies an assumption in petitioner's argument, but fails to demonstrate its falsity. To the contrary, the assumption is supported by both case law and common sense. See, *e.g.*, *Francis v. Franklin*, 471 U.S. 307, 324-25, n.9 (1985); *Gregg v. Georgia*, 428 U.S. 192-93. Following the unadorned mandatory sentencing instruction, and particularly in the context of the prosecutor's intensive catechism regarding the operation of this instruction during voir dire, the jury would manifestly have felt *forbidden* by law to reevaluate the weights attached to the aggravation and mitigation as a means of tempering the ultimate sentencing decision. The precise point of the prosecutor's voir dire, the sentencing instruction, and the prosecutor's penalty argument was to eliminate any such outcome-oriented deliberation process. Respondent asserts that even if the mandatory sentencing instruction overrode a jury determination that death was *not* the appropriate punishment, no constitutional right of petitioner's was violated. RB 92 n.1. However, *Penry v. Lynaugh*, *supra*, squarely holds that a statutorily prescribed death-sentencing process which affirmatively restrains the jury's exercise of reasoned moral judgment in the ultimate choice of penalty violates the Eighth Amendment.

In petitioner's case, the jury could easily have found that the aggravating evidence was substantial, that the mitigating evidence was also substantial, but that the aggravating evidence "outweigh[ed it] just a little bit" as the prosecutor suggested.

RT 1279. Under the trial court's instruction as exploited by the prosecutor's voir dire catechism, these findings would have made a sentence of death the "legal decision" that "the state of California requires in this particular case," *ibid.*, leaving no room at all for the reasoned moral response required by the Eighth Amendment.

C. Respondent Invents Certain Purported Virtues Of The Mandatory Sentencing Instruction Which Are Wholly Illusory And Unsupported.

Respondent not only refuses to acknowledge any potential for constitutional impropriety in the mandatory sentencing instruction, but argues that the instruction (which, of course, the California Supreme Court no longer permits) has positive constitutional virtues. RB 72-75. Respondent declares that the mandatory sentencing instruction "provides a specific procedure (weighing aggravation against mitigation),¹⁶ which insures that the death penalty will be imposed 'with regularity', rather than 'freakishly or rarely.'" RB 73. Respondent is correct that the unadorned mandatory sentencing instruction certainly results in *more frequent imposition* of the death penalty than does a process that permits the jury to exercise a reasoned moral response. (The Alameda County sentencing experience described in the CAP Amicus Brief clearly demonstrates this.) However, numerical "*frequency*" in imposition of the death sentence is not equivalent to constitutional "regularity," nor is frequency of imposition a constitutional virtue when achieved by mechanistic procedures that force juries to violate the law in order to express their reasoned judgment

¹⁶ Respondent takes his eye off the ball by arguing as if the *weighing* provision itself was the target of petitioner's complaint. As noted below, petitioner *supports* a weighing exercise which *guides* but does not *dictate* the choice of penalty. It is only the mandatory sentencing directive superimposed on the otherwise instructive weighing exercise which interferes with the jury's determination of the appropriate punishment.

that the crime and the defendant do not deserve death. *Woodson v. North Carolina*, *supra*, 428 U.S. at 302-303; *Penry v. Lynaugh*, *supra*.

Respondent touts the mandatory sentencing instruction as a salutary safeguard against the vice of "unbridled discretion." RB 81-82. However, a statute *adequately* channels discretion where it merely narrows the determination of capital eligibility and then leaves the ultimate sentencing judgment to the jury's discretion. *Zant v. Stephens*, *supra*, 462 U.S. at 880. In contrast, the California capital sentencing scheme as it currently operates in light of *People v. Brown* (and without the former mandatory sentencing instruction challenged here) provides a number of *additional* channelling devices, well above the constitutional minimum, to safeguard against the specter of "unbridled discretion." See *Pulley v. Harris*, 465 U.S. 37, 51-53 (1984).¹⁷ California now provides an illustrative list of relevant penalty consideration factors, and directs the jury to engage in the instructive exercise of weighing aggravation against mitigation to provide a comparison context for the ultimate penalty determination. The jury's discretion is thus *channelled* but not *overborne* by the list of factors (illustrative, not exhaustive) and the weighing instruction (hortatory, not

¹⁷ Petitioner notes that the suggestion in the Amicus Brief of the Criminal Justice Legal Foundation that "the elimination of the mandatory sentencing instruction contributes to the *McClesky* problem" (CJLF Brief 22) is simply preposterous. Having corrected the factual errors contained in its brief as originally filed, CJLF still claims an ability to discern a "McClesky problem" based on a pool of 15 cases, an irresponsible inference even when qualified as "tentative". CJLF Brief 22. Petitioner proffers the Alameda County data as a demonstration of the raw unadulterated fact that the mandatory sentencing instruction would have resulted in 8 otherwise uncalled for death sentences in Alameda County. Petitioner's point does not rest on any statistical claim, but rather on readily observable reality. CJLF, in contrast, purports to divine a glimmer of an underlying process which can be documented, if at all, by statistical analysis of a very large sample of cases.

mandatory). Thus, respondent's invocation of the unadorned mandatory sentencing instruction as a bulwark against a regression to the Dark Ages of unbridled discretion is legally and factually untenable.

CONCLUSION

Wherefore for the foregoing reasons, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD BOYDE,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

**BRIEF OF THE
CALIFORNIA APPELLATE PROJECT
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE

Amicus has obtained consent of the parties to file this brief.

The California Appellate Project ("CAP") is a non-profit corporation established by the State Bar of California to recruit attorneys for death penalty appeals in this state and then to assist appointed counsel in providing quality representation. CAP currently provides direct representation to 8 death row defendants and assists appointed counsel in more than 170 other capital appeals. Accordingly, CAP is familiar with the two issues on which certiorari was granted in the present case.

PRELIMINARY STATEMENT

The questions to be resolved in this case involve the constitutionality of a death sentence handed down by a California jury acting in accordance with two now-defunct jury instructions relating to (1) what evidence the jury may consider in mitigation, and (2) how the jury determines whether to sentence the defendant to death. See former CALJIC Nos. 8.84.1 & 8.84.2.¹ Although the California Supreme Court subsequently modified both of the challenged instructions in response to many of the concerns that amicus raises in this brief, see *People v. Easley*, 34 Cal.3d 858, 878, n.10 (1983) and *People v. Brown*, 40 Cal.3d 512, 544, nn.17 & 19 (1985), petitioner did not receive the benefit of those changes at his trial.

¹ The sentencing jury at petitioner's trial in 1982 was given the then-standard CALJIC jury instructions, which closely tracked the language of the relevant statutory provision. See former CALJIC Nos. 8.84.1 & 8.84.2 (4th ed. 1979); Cal. Penal Code § 190.3.

While the statutory provisions have remained unchanged to the present, the CALJIC instructions have since been revised to conform to *People v. Easley* and *People v. Brown*, *infra*. CALJIC No. 8.84.1 was revised in 1984 and 1986, and CALJIC No. 8.84.2 was revised in 1986. The 1984 and 1986 revisions have recently been renumbered. See CALJIC Nos. 8.85 & 8.88 (5th ed. 1988). See Appendices A & B.

In this brief, amicus refers to the CALJIC instructions used at petitioner's trial as "former CALJIC No. 8.84.1" or "former CALJIC No. 8.84.2." These are the pre-*Easley* and pre-*Brown* versions of CALJIC Nos. 8.84.1 and 8.84.2, respectively. The "former Factor (k) instruction" mentioned in this brief was a part of former CALJIC No. 8.84.1.

STATEMENT OF FACTS

A defendant convicted in a California Superior Court of first-degree murder with one or more "special circumstances" is eligible to be sentenced to death. Cal. Penal Code § 190.2. Generally, the truth or falsity of any alleged special circumstance is determined "at the same time" as the defendant is found guilty of first-degree murder. Cal. Penal Code §§ 190.1(a), 190.4(a).

There are 18 categories of special circumstance that make a first-degree murder conviction into a capital conviction, and those 18 categories encompass at least 27 different kinds of aggravating matters.² Cal. Penal Code § 190.2(a).

Once a defendant has been convicted of first-degree murder with one or more special circumstances, the trial proceeds to the penalty phase. Cal. Pen. Code §§ 190.3, 190.4. In general, at the penalty phase "evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition." Cal. Penal Code § 190.3.

In addition to the evidence received at the penalty phase, the sentencer -- normally, a jury -- must also consider "evidence

² This does not include the special circumstance defined in Cal. Penal Code § 190.2(a)(14), which was invalidated by the California Supreme Court in *People v. Superior Court (Engel)*, 31 Cal.3d 797 (1982). Nor have we counted § 190.2(b), which separately provides that all but one of the various special circumstances may be applied to an accomplice of the actual killer.

presented at any prior phase of the trial." Cal. Penal Code § 190.4(d); see Reporter's Transcript (RT) 4831:25-26.

After having heard and received all of the evidence, the sentencer is then required to determine which penalty -- life without possibility of parole, or death -- shall be imposed on the defendant. Former CALJIC No. 8.84. The sentencer is to "take into account [eleven enumerated] factors if relevant." Cal. Penal Code § 190.3.³ If the sentencer concludes, based on "the [eleven] aggravating and mitigating circumstances referred to,"

³ The eleven factors listed in § 190.3 (and in former CALJIC No. 8.84.1) are:

- "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
- "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
- "(c) The presence or absence of any prior felony conviction.
- "(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- "(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- "(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
- "(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
- "(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication.
- "(i) The age of the defendant at the time of the crime.
- "(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
- "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

that the aggravating circumstances outweigh the mitigating circumstances, then it "shall impose a sentence of death." *Id.* But if it concludes that the mitigating circumstances outweigh the aggravating, it "shall impose a sentence" of life imprisonment without possibility of parole. *Id.*

Two points are worth noting about the factors to be considered by the sentencer. First, the sentencer is limited to considering the eleven factors listed in § 190.3 (and former CALJIC No. 8.84.1). This is clear from the language of § 190.3 itself (the sentencer's weighing of aggravation and mitigation involves "the aggravating and mitigating factors referred to in this section"), from the former CALJIC No. 8.84.2 jury instruction (the jury weighs "the applicable factors of aggravating and mitigating circumstances upon which you [the jury] have been instructed," see RT 4836:7-9), and from case law, *People v. (Juan) Boyd*, 38 Cal.3d 762, 773-74 (1985).

Second, the sentencer is told to consider the enumerated factors "if relevant" or "if applicable." The sentencer determines when, or if, a factor is "relevant" or "applicable." *People v. Hernandez*, 47 Cal.3d 315, 364 (1988); *People v. Ruiz*, 44 Cal.3d 589, 619-20 (1988).

At petitioner's penalty trial in early 1982, the prosecution presented aggravating evidence of past offenses and other alleged misconduct by petitioner and of his poor reputation with law enforcement officers. *People v. Boyde*, 46 Cal.3d 212, 247-48 (1988). In mitigation, petitioner presented testimony from family and friends describing his deprived background and his good qualities. Petitioner's family was poor, and petitioner had health problems from an early age. He never knew his father. People close to petitioner found him to be a giving person, good with children, and a good companion. He had looked hard for work after his release from prison, but his efforts had been unsuccessful. A psychologist testified that petitioner has an inadequate personality with limited resources and low self-esteem. He is often depressed, and his intelligence was rated at between borderline and dull-normal. When petitioner was younger, his family tried without success to

persuade the school system to provide him with counseling, which they were unable to afford themselves. *Id.* at 248-49.

Petitioner's sentencing jury was given the then-standard CALJIC jury instructions, which closely tracked the language of the relevant statutory provisions. Compare RT 4831-33, 4836, and former CALJIC Nos. 8.84.1 and 8.84.2 with Cal. Penal Code § 190.3. Thus, the jury was instructed to consider the ten specific Factors (a) through (j), as well as Factor (k), which allowed the jurors to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." RT 4832:1 - 4833:6. The jury was then told it "shall impose a sentence of death" if the aggravating circumstances outweighed the mitigating circumstances "upon which you have been instructed." RT 4836:5-12.

This Court should note that neither the former Factor (k) instruction nor the "shall impose death" instruction used at petitioner's trial would be given in a capital trial in California today. For the past five and one-half years, the California Supreme Court has recognized that a jury instruction which tracks the exact language of Factor (k) in § 190.3 might not adequately convey the scope of mitigating evidence that a sentencing jury is constitutionally required to consider. *People v. Easley*, 34 Cal.3d 858. The court has therefore ordered that the language of the former Factor (k) instruction be expanded to allow the jury to consider "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" *Id.*, at 878, n.10.

In 1985 the California Supreme Court similarly ordered substantial revisions to what was formerly the "shall impose death" instruction. *People v. Brown*, 40 Cal.3d at 544, nn.17 & 19. Now, in lieu of being required to impose death whenever the aggravating circumstances outweigh the mitigating circumstances, a California sentencing jury is instructed to "determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating

circumstances." CALJIC No. 8.88 (5th ed. 1988); *see also* former CALJIC No. 8.84.2 (1986 Revision).

SUMMARY OF ARGUMENT

The issue in this case is the constitutionality, as applied to petitioner's trial, of two now-abandoned jury instructions whose effect, singly and collectively, was to prevent the jury from "considering, as a mitigating factor," or from "giving independent mitigating weight to," any "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 605 (1978) (emphasis omitted). The California Supreme Court found, by a four-to-three vote, that there was no constitutional violation as to either of the challenged instructions. *People v. Boyde*, 46 Cal.3d 212, 251, 255 (1988).

The first instruction raises the question whether a reasonable juror would understand from the language of the former Factor (k) instruction that he or she could consider and give effect to evidence of petitioner's background and character even if that evidence did not extenuate or relate to the crime itself. The short answer to this question is "no." The former Factor (k) instruction allowed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The plain meaning of this instruction, by itself and when considered in conjunction with the other mitigating factors in the jury instructions, is that mitigating evidence unrelated to the crime was not to be taken into account.

This straightforward reading of the instructions is reinforced by convincing real-world evidence. Before *Easley's* revision of the former Factor (k) instruction, it was the widespread practice of prosecutors, attorneys general, judges, and even defense counsel to interpret that instruction in precisely the unconstitutional manner indicated by the plain language of the instruction. Because such powerful empirical evidence coincides with the natural import of the instruction, the

conclusion is unavoidable that reasonable jurors, too, would have interpreted that language in the same manner. At the very minimum, "a reasonable juror could have understood the charge" as having an unconstitutional meaning. *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985).

The second instruction at issue in the present case told the jury that it "shall impose a sentence of death" if the aggravating circumstances outweighed the mitigating circumstances. RT 4836:10-12. Amicus first argues that this simplistic formula dictated the choice of penalty by a mechanical weighing of aggravation against mitigation and thus conflicted with the constitutionally required determination of whether death is the appropriate punishment.

Next, amicus surveys the performance of California prosecutors in arguing the import of the mandatory sentencing instruction to their penalty juries, and demonstrates the frequency with which the prosecutors read the instruction to *require* a mechanistic weighing of aggravation versus mitigation and to *preclude* moral consideration of whether death is the appropriate punishment. Amicus urges that this extensive track record of prosecutorial explication of the instruction indicates how reasonable penalty jurors as well would have understood the instruction.

Amicus also examines the capital sentencing experience in Alameda County, California, during a period when penalty juries were *not* instructed with the mandatory sentencing formula and were instead given the option of returning a life verdict even if aggravation was found to outweigh mitigation. The numerous life verdicts accompanied by a finding that aggravation outweighs mitigation demonstrate that the simplistic weighing formula embodied in the mandatory sentencing instruction is *in no way* a proxy for the constitutionally required determination of whether death is the appropriate punishment.

ARGUMENT

I.

THE FORMER FACTOR (K) INSTRUCTION WOULD HAVE
BEEN UNDERSTOOD BY A REASONABLE JUROR AS
LIMITING THE JURY'S CONSIDERATION OF
MITIGATING EVIDENCE TO THAT WHICH
RELATED TO "THE CRIME" ITSELF.

It is settled that a sentencing authority in a capital case may not constitutionally be precluded from "considering, as a mitigating factor," or from "giving independent mitigating weight to," any "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. at 604 & 605; see e.g., *Penry v. Lynaugh*, 492 U.S. ___, 45 Crim.L.Rep. 3188, 3192 (1989); *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987).

Relevant mitigating evidence encompasses the "compassionate or mitigating factors stemming from the diverse frailties of humankind." *McCleskey v. Kemp*, 481 U.S. at 304 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). It includes both "mitigating aspects of the crime," *Lowenfield v. Phelps*, 484 U.S. ___, 98 L.Ed.2d 568, 582 (1988), and also mitigation that is *not* related to the crime. "Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so" *Gathers v. South Carolina*, ___ U.S. ___, 45 Crim.L.Rep. 3076, 3079 (1989) (O'Connor, J., dissenting). For even if mitigating inferences from the evidence "would not relate specifically to petitioner's culpability for the crime he committed," nevertheless "such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (quoting *Lockett v. Ohio*, *supra*, 438 U.S. at 604); *Sumner v. Shuman*, 483 U.S. ___, n.5, 97 L.Ed.2d 56, 66 (1987). See also *Hitchcock v. Dugger*, 481 U.S. 393, 397-98 (1987), in which a unanimous Court reversed a death sentence because the sentencers had been precluded from considering, *inter alia*,

evidence having no bearing on the crime but which showed that "as a child petitioner had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers."⁴

When a California jury decides whether to sentence a capital defendant to death or life without parole, the framework for its decision is its consideration of an exclusive list of eleven enumerated aggravating and mitigating factors. See RT 4836:6-9; former CALJIC No. 8.84.2. While several of these eleven factors refer to some aspect of the defendant's background, record, and the circumstances of the offense, only one factor even purports to give the jury broad authority to consider all relevant aspects of his background and character as independent mitigating circumstances. At the time of petitioner's trial, this one factor was former Factor (k): "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." RT 4833:4-6.

Respondent has defended the former Factor (k) instruction as allowing full consideration of mitigation. In fact, however, the former Factor (k) instruction plainly had the opposite effect. It restricted mitigation to crime-related factors, and it excluded consideration of the kind of mitigating character and background evidence that petitioner presented and that the *Lockett* line of decisions requires to be considered.

Petitioner presented considerable mitigating evidence to establish that, *notwithstanding the gravity of the crime* of which he had been convicted, and even if the jury concluded there

⁴ See also *McCleskey v. Kemp*, 481 U.S. at 307, n.28 ("Numerous legitimate factors may influence the outcome of a trial and defendant's ultimate sentence, even though they may be irrelevant to his actual guilt"); *California v. Brown*, 479 U.S. 538, 544-46 (1987) (O'Connor, J., concurring).

were no circumstances extenuating the seriousness of the crime, there were in petitioner's character and background certain redeeming qualities and other compassionate "factors stemming from the diverse frailties of humankind" such that he should not die for his crime. See *Woodson v. North Carolina*, 428 U.S. at 304. For example, the sentencing jury was told about the poverty in which petitioner grew up, and about the family's abandonment by petitioner's father and petitioner's obsession with that loss. The jury heard about petitioner's ill health and early psychological problems and his family's unsuccessful efforts to obtain counseling for him. The jury also heard expert testimony regarding petitioner's inadequate personality, his limited resources, low self-esteem and frequent depression. There was also evidence of petitioner's considerable efforts to obtain work and of his good relationships with children and others close to him.

Under *Lockett*, *Skipper*, *Hitchcock*, and *Penry*, petitioner was constitutionally entitled to have the sentencer consider all of this evidence in mitigation of punishment, but no reasonable juror would have understood this from the former Factor (k) instruction given at the trial. Rather, upon hearing that mitigation was limited to that which extenuates the gravity of "the crime" even though it is not a legal excuse for "the crime," a reasonable juror would have concluded that petitioner's mitigation evidence was irrelevant because it was "extraneous to the crime itself," *Gathers v. South Carolina*, 45 Crim.L.Rep. at 3079 (O'Connor, J., dissenting), or "would not relate specifically to petitioner's culpability for the crime he committed," *Skipper v. Ohio*, 476 U.S. at 4.

This unconstitutional interpretation of the former Factor (k) instruction was also compelled by the language of the immediately preceding factors listed in former CALJIC No. 8.84.1. For, every one of the other purely mitigating factors⁵ in

⁵ Factors (d), (e), (f), (g), (h), and (j) are purely mitigating factors, *People v. Hamilton*, 48 Cal.3d 1142, 1184 (1989) and cases cited, as is Factor (k), *People v. Edelbacher*, 47 Cal.3d 983, 1033 (1989).

former CALJIC No. 8.84.1, as well as the "metonym" (Factor (i)),⁶ contained words of limitation equivalent to those used in the former Factor (k) instruction. Thus, Factor (h) allowed consideration of a defendant's impaired capacity only insofar as this impairment operated "at the time of the offense." Factor (d) authorized consideration of a defendant's extreme mental or emotional disturbance only if it operated while "the offense was committed." Factor (i) permitted consideration of the defendant's age "at the time of the crime." In a parallel fashion, the remaining mitigating factors could be deemed applicable or relevant only insofar as they related to "the offense" (Factors (f) and (j)), to "the defendant's homicidal conduct" or "homicidal act" (Factor (e)), or to the time that "defendant acted" (Factor (g)).

After hearing this unbroken sequence of instructions limiting mitigating factors to the crime itself, no reasonable juror would have interpreted the former Factor (k) instruction -- which also spoke of mitigation relating to "the crime" -- to mean that mitigation *not* related to the crime could be considered. No reasonable juror would have concluded that although the former Factor (k) instruction seemed to contain the same kind of limitation as appeared in Factors (d) through (j), nevertheless the former Factor (k) instruction opened up consideration of an entirely new kind of mitigating evidence. No reasonable juror would have concluded that, as to Factor (k) but only Factor (k), character and background evidence extraneous to the crime itself could be considered.

Thus, not only is the language of the former Factor (k) instruction likely to be interpreted in an unconstitutional

⁶ Factor (i) refers to "[t]he age of the defendant at the time of the crime." The California Supreme Court has ruled that "mere chronological age by itself is not relevant to the appropriate penalty and is neither aggravating nor mitigating." *People v. Bean*, 46 Cal.3d 919, 952 (1988). Rather, Factor (i) is a "metonym" that refers to "any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." *People v. Lucky*, 45 Cal.3d 259, 302 (1988).

manner when viewed on its own terms, but that interpretation is reinforced, indeed compelled, by the restrictive language of the seven Factors that preceded it. Thus a fair-minded juror would clearly have understood the instructions in petitioner's case as restricting his or her consideration of mitigating evidence in an unconstitutional manner. See *Cabana v. Bullock*, 474 U.S. 376, 383 (1986).

That reasonable jurors would have understood the former Factor (k) instructions in an unconstitutionally restrictive manner is dramatically confirmed by evidence from the "real world" of death penalty litigation in California. Before November 1983, when the California Supreme Court directed that the former version of the Factor (k) instruction be modified in future trials, *People v. Easley*, 34 Cal.3d at 878, n.10, it was a common occurrence to find California deputy district attorneys, judges, deputy attorneys general, and indeed defense counsel interpreting the former Factor (k) instruction to exclude consideration of background and character evidence. Their interpretations were not based on any appellate court decision or any arcane principle of law; rather, they were based on a common sense reading of the plain words of the statute and the CALJIC instruction. Taking these prosecutors and judges to be reasonable persons, we have, then, very compelling evidence that other reasonable persons -- namely, jurors in capital cases -- would also arrive at an unconstitutional interpretation of the former Factor (k) instruction in former CALJIC No. 8.84.1.

The following examples powerfully illustrate the common pre-*Easley* interpretation of the former CALJIC instruction on Factor (k). In *People v. Davenport*, Cal. Sup. Ct. Crim. No. 22356, the prosecutor explained the former Factor (k) instruction to the penalty jury in the following terms: "All right, the next thing [is] whether there are any other circumstances, any other circumstance that extenuates the gravity of the crime even though it is not a legal excuse for the crime. [¶] Now, a little attention to the way that is written is whether there is any circumstance that extenuates the gravity of the crime -- [¶] All right, I recognize in this case, in the penalty phase, we have

evidence presented by the defense, primarily about what a bad person the defendant's mother was and that the defendant did not receive good treatment at all times at the hands of his mother. [¶] I submit to you that, you know, in order to find it to be a mitigating circumstance, you have got to find, somehow, that it is something it has something to do with the crime because this asks you to [consider], a circumstance that extenuates the gravity of the crime." Crim. No. 22356, RT 3004-05.

Similarly, the prosecutor in *People v. Payton*, Crim. No. 22511, told the penalty jury that "[Factor] 'K' says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact -- okay? -- some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. [¶] It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this newborn Christianity. . . . Referring back to 'K' which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody. [¶] The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed. [Defense counsel] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when -- under any other circumstance which extenuates or lessens the gravity of the crime, refers -- seems to refer to a fact in operation at the time of the offense. [¶] What I am getting at, you have not heard during the past few days any legal evidence mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all." Crim. No. 22511, RT 2121-22, 2125.

In a similar vein, the prosecutor in *People v. Guzman*, Crim. No. 22418, told the penalty jury the following about Factor (k)

and the defense evidence in mitigation: "Finally, were there any other extenuating circumstances that somehow lessen the gravity of the crime of murder? Certainly not. None whatsoever. . . . The only thing that the defendant has brought forward here that he testified to, he says he testified to it in behalf of his argument for death, is his ability to paint. [¶] Well, we can see that. These paintings are high quality. He does fine work for someone who certainly learned on his own, took the initiative to learn it in prison. He should be commended for that. That's fine. But it certainly is not a factor in mitigation. [¶] When you hear the law as I anticipate the Court will instruct you, you won't hear anything about whether or not someone is a painter. . . ." Crim. No. 22418, RT 1571, 1575-76.

Again, in *People v. Keenan*, Crim. 22956, defense mitigating evidence was adverted to by the prosecutor in the following terms: "the law does provide for any extenuating circumstances, any other circumstance which extenuates the gravity of the crime. [¶] I question the relevance of the testimony from Ms. Cherry and Mr. Haney. I do so because essentially, as I view it, their testimony related to present conditions at San Quentin prison over in Tamal in Marin County and an opinion as to how the defendant, Maurice Keenan, might adapt himself to those conditions. [¶] I question the relevance of that because it does not go to the gravity of the crime." Crim. No. 22956, RT 3513.

Trial judges, too, had the same view of Factor (k). For example, in *People v. Bigelow*, Crim. 22018, at the hearing where the judge was to rule on the defendant's motion to modify the death verdict pursuant to California Penal Code § 190.4(e), the judge stated, "No, I don't think that [testimony from the defendant's brothers and sisters concerning the defendant's childhood and 'not being raised with proper parents'] would [fall within the 'catchall K']. I don't see how your childhood, because you've evidently had a not too happy childhood, but that doesn't give you the right to come to America and take an innocent man and kill him. Does it?" Crim. No. 22018, 5/8/81 RT 28.

Similarly, in *People v. Edelbacher*, Crim. 23126, where the defendant had presented testimony from eight defense witnesses as to numerous positive qualities displayed by the defendant, the judge ruled at the motion for reduction of penalty that "[t]he members of the defendant's family and friends of the family who testified did not, in the Court's opinion, present any evidence which could be considered as a moral justification or extenuation for his conduct" and that "there are no factors in mitigation." Crim. No. 23126, RT 5276.

Indeed, so pervasive was the common understanding of the limited scope of the former Factor (k) instruction that defense counsel felt constrained against presenting relevant mitigating evidence.⁷ Nor have these misunderstandings of Factor (k)

⁷ For example, in *People v. Hitchings*, Cal. Sup. Ct. Nos. Crim. 23905 and S004189, the trial attorneys had refrained from presenting mitigating evidence unrelated to the crime. When these omissions were challenged in a state habeas corpus petition as (*inter alia*) the constitutionally inadequate assistance of counsel, the attorneys filed affidavits explaining under penalty of perjury that, for example, "[f]rom my reading of the statutory factors in aggravation and mitigation, I saw no basis upon which the jury would be expressly authorized to consider the sympathetic circumstances of Keith's background as a mitigating factor. The one broad factor (factor 'k') appeared by the statutory language to be limited to factors relating to the crime. This was my understanding of factor 'k' and I believe this was also the understanding of District Attorney and trial judge." S004189, affidavit of William T. Kay, Jr. (emphasis added).

Similarly, his cocounsel declared that "Factor k' - the only broad factor - appeared by its language to be specifically limited to mitigation of 'the gravity of the crime.'" Affidavit of Paul Brisso.

been limited to trial participants. On appeal in *People v. Lucero*, Crim. No. 22504, the attorney general's office argued that "[t]he evidence presented at the penalty phase should mitigate or aggravate the penalty for the offense of which a defendant has been convicted. . . . However, evidence relating to the offender should have some relationship to the offense. Simply asserting that a defendant has a problem when the witness cannot tie in the problem with what happened in the case is thus of no value and adds nothing to the issue before the jury." Crim. No. 22504, Respondent's Brief at 56.⁸

A limited interpretation of the former Factor (k) instruction so clearly flows from its plain language that in *People v. McDowell*, Crim. No. 24110, eleven of twelve jurors sought the trial court's assistance in correcting the contrary view of the lone holdout. During deliberations, the jury sent the following note to the judge: "Direction. We have an 11-to-one vote for death. The one juror emphatically feels the mitigating circumstances are equal to the aggravating circumstances. The other eleven jurors do not agree with the juror's mitigating circumstances as all being testimony or evidence that should be considered. [¶] Please advise which following circumstances can be considered mitigating circumstances: No. 1. Inadequate or insufficient psychiatric help. No. 2. Love-hate relationship with father/mother. No. 3. Daily and extreme mental abuse by father. Also witness to daily physical abuse to mother and siblings. No. 4. Religious extremes confused defendant. No. 5. Confusing sexual mores at home. Parent incest with mother condoning or aware of incest/abuse. No. 6. Accused of death

⁸ It is also significant to note that the attorney general's brief on appeal in *People v. Sixto*, Crim. No. 22990, admitted that the language of the former Factor (k) instruction "obviously does not specifically inform a jury to consider defendant's character and background evidence" Respondent's Brief at 194. (Respondent went on to argue that Mr. Sixto's death sentence was valid because Sixto had been allowed to present mitigating evidence and because the jury had been instructed to consider all the evidence received in any phase of the trial. *Ibid.* This is the same reasoning as proffered by the state court in petitioner's case and is disposed of later in this section. See fn. 11 and accompanying text.)

of favorite sister. No. 7. Stress of divorce from family. No. 8. Rejection of mother's love during teen years. Thank you." Crim. No. 24110, RT 2429-30.⁹

Thus, in determining how a reasonable juror would have understood the former Factor (k) instruction, this Court will find a complete convergence of (1) the most reasonable interpretation of the words of the instruction itself, (2) the meaning of the seven preceding factors in former CALJIC No. 8.84.1, and (3) the contemporaneous understanding of the meaning of those words by prosecutors and judges familiar with both the language and context of Factor (k). The inevitable conclusion is that the jurors at petitioner's trial would have understood the former Factor (k) instruction as limiting their ability to consider and give effect to petitioner's mitigating evidence.

And, a fortiori, under the applicable test of whether "a reasonable juror could have understood the charge" as having an unconstitutional meaning, a finding of constitutional error is even more clearly compelled. *Francis v. Franklin*, *supra*, 471 U.S. at 315-16; *Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979); *Mills v. Maryland*, 486 U.S. ___, 100 L.Ed.2d 384, 394 (1988); *see also Andres v. United States*, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of §567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused.").

The California Supreme Court upheld petitioner's death sentence on the ground that, because the jury "was permitted to hear defendant's background and character evidence and his attorney's lengthy argument concerning that evidence," the jury must have considered the evidence. *People v. Boyde*, 46 Cal.3d at 251. But, as this Court has repeatedly made clear, "the

⁹ Despite defense counsel's request that the jury be informed that all eight listed factors were "proper," the judge in *McDowell* told the jury to "go back and read the instructions." RT 2435. The jury returned a death verdict.

provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury." *Gregg v. Georgia*, 428 U.S. 153, 192 (1976). "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 45 Crim.L.Rep. at 3192; *Hitchcock v. Dugger*, 481 U.S. at 398-99; *Eddings v. Ohio*, 455 U.S. 104 at 113; *id.* at 119 (O'Connor, J., concurring).

These constitutional principles have particular relevance to a case where, as at petitioner's trial, the judge informs the sentencing jury that they may consider and weigh only the aggravating and mitigating factors "upon which you have been instructed." RT 4836:7-9. If only one of the enumerated factors purports to cover the defendant's background and character in general, then that factor must not preclude consideration of relevant character and background evidence that is "extraneous to the crime itself." *Gathers v. South Carolina*, 45 Crim.L.Rep. at 3079 (O'Connor, J., dissenting).

Indeed, the California Supreme Court's reliance on petitioner's presentation and argument concerning mitigating evidence flatly contradicts this Court's decisions in *Hitchcock* and *Penry*. In *Hitchcock*, the defendant both presented mitigating evidence of his character and background and also argued to the advisory jury that it was to "consider everything together." 481 U.S. at 398. However, because the instructions listed the eight "mitigating circumstances which you may consider" -- none of which covered character and background evidence -- this Court unanimously held "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." *Id.* at 398-99.

Likewise, in *Penry*, *supra*, although the defendant "was free to introduce and argue the significance of his mitigating circumstances to the jury," 45 Crim.L.Rep. at 3194, nevertheless

this Court reversed because of "the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence," *id.* at 3195.¹⁰

Thus, the fact that petitioner Boyde was allowed to proffer relevant mitigating evidence cannot overcome the plain fact that the effect of the instructions in his case was to tell the jury not to consider it.¹¹

¹⁰ This Court has reached analogous results in cases where the judge was the sole sentencing authority. In both *Eddings* and *Lockett*, mitigating evidence was admitted before the sentencing judge. However, because the judge in each case believed the evidence was irrelevant to his sentencing decision, *Eddings*, 455 U.S. at 113, or was beyond "[t]he limited range of mitigating circumstances which [could] be considered," *Lockett*, 438 U.S. at 608, this Court reversed the death judgments. The results in *Hitchcock*, *Penry*, and petitioner's case are merely applications of the *Lockett-Eddings* principles to cases where the jury plays a major sentencing role.

¹¹ For similar reasons, the California Supreme Court was unjustified in relying on the instruction to petitioner's jury to "consider all of the evidence which has been received during any part of the trial of this case." *Boyd*, 46 Cal.3d at 251; RT 4831:25-26. The fallacy in the lower court's reasoning is that the instruction to "consider all of the evidence" has nothing to do with what issues the jury must decide, but merely tells the jury where to look to find the information needed to decide the issues.

This Court recognized this very distinction in *Lockett v. Ohio*. At issue in *Lockett* was the constitutionality of a death sentence arrived at under the then-existing Ohio death penalty scheme. Although the sentencer was required under that system to "consider[] the nature and circumstances of the offense and the history, character, and condition of the offender," *see State v. Bayless*, 48 Ohio St.2d 73, 86 (1976), such evidence was made relevant for mitigating purposes only insofar as it shed light on one of three statutory mitigating circumstances. *Lockett*, 438 U.S. at 607-08. This Court struck down the death sentence, because despite the broad scope of the evidence that could be considered, the sentencer could give mitigating effect to that evidence only insofar as the evidence was relevant to "the three factors specified in the statute." *Id.* at 608.

As *Lockett* shows, an open-ended provision about what evidence may be admitted or considered does *not* cure the defect of limiting the mitigating factors to which the evidence relates. Thus, the Court in *Lockett*, rejected the reasoning

II.

THE CALIFORNIA MANDATORY SENTENCING
INSTRUCTION VIOLATES THE EIGHTH AND
FOURTEENTH AMENDMENTS.

- A. California Could Not Constitutionally Require That The Choice Of Penalty Be Dictated By A Mechanical Formula Which Was Inconsistent With The Determination Of Whether Death Is The Appropriate Punishment.

The Eighth and Fourteenth Amendments afford a capital defendant the right to a determination by the trier of fact on the ultimate question of whether, upon consideration of aggravating and mitigating evidence, "death is the appropriate punishment." *Penry v. Lynaugh*, 45 Crim.L.Rep. at 3195. While no single procedure or instruction is indispensable to the implementation of this fundamental principle, the constitutional bottom line is that any particular capital sentencing procedure must enable the trier of fact to render a reasoned moral judgment as to the appropriateness of the death penalty. *California v. Brown*, 479 U.S. at 545 (O'Connor J., concurring). The trier of fact cannot be compelled to return a death verdict based solely upon a determination that aggravating factors exist that surpass the constitutional threshold for imposition of the death penalty. *Sumner v. Shuman*, 97 L.Ed.2d at 65-66. Nor may the trier of fact be precluded from returning a life verdict based on the defendant's mitigating evidence, *Hitchcock v. Dugger*, 481 U.S. 393, simply because the prosecution has

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used by the California Supreme Court in petitioner's case. See also *Penry v. Lynaugh*, 45 Crim.L.Rep. 3188 (although the *Penry* sentencing jury "could consider all the evidence submitted in both the guilt or innocence phase and the penalty phase of the trial," *id.* at 3190, *Penry's* sentence was reversed because the instructions guiding the jury's actual sentencing decision did not provide a vehicle for the jury to give mitigating effect to his mitigating evidence).

presented a large quantity of aggravating evidence, *Sumner v. Shuman*, 97 L.Ed.2d at 67-70.

The California mandatory sentencing instruction at issue in this case ("If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death") violated these fundamental constitutional principles. It restricted the penalty jury's deliberative process to a mechanistic weighing of aggravating and mitigating factors *against each other*, without permitting any determination that the case in aggravation was simply insufficient to warrant a death sentence (regardless of the quantum of mitigation involved) or that the case in mitigation was sufficient to warrant a life sentence (regardless of the quantum of aggravation involved). Thus, it mandated a choice of penalty based on this mechanistic weighing process without any provision for (indeed, to the exclusion of) any overall determination, any reasoned moral evaluation, of whether death is the appropriate punishment.

This severe circumscription of the jury's sentencing discretion, skewing the choice of penalty toward death, violates the constitutional guarantee of an individualized sentencing decision. "Indeed, the California Supreme Court has conceded that a juror who finds that the aggravating evidence outweighs the mitigating evidence, but who believes that the death sentence is not appropriate, may reasonably understand [the mandatory sentencing instruction] to require him to vote for a sentence of death." *California v. Hamilton*, ___ U.S. ___, 102 L.Ed.2d 1002, 1004 (1989) (Marshall, J., dissenting from denial of certiorari) (citing *People v. Brown*, 40 Cal.3d 512, *People v. Myers*, 43 Cal.3d 250 (1987) and *People v. Hamilton*, 45 Cal.3d 351 (1988)).¹²

¹² See also *State v. Holland*, No. 870410 (Utah, June 21, 1989) (vacating death sentence as unconstitutional because trial court merely found that aggravation outweighed mitigation and failed to make the necessary further determination of whether death was the appropriate punishment under all of the circumstances.)

B. The Established Track Record Of California Prosecutors In Arguing The Meaning Of The Former CALJIC No. 8.84.2 Sentencing Instruction Demonstrates That Reasonable Penalty Jurors Would Have Understood It To Limit Their Penalty Decision To A Mandatory Result Dictated By A Mechanistic Weighing Procedure.

As in Argument I, amicus now summarizes how the state's prosecutors have read the challenged instruction as a strong indication of how reasonable penalty jurors would understand it.

Amicus submits that the following examples of prosecutorial penalty argument regarding the identical instruction given in *Boyde*'s case demonstrate that reasonable jurors would have understood themselves as being precluded from making a reasoned moral response to the overall aggravating and mitigation evidence, and instead as being directed to engage in a mechanistic weighing process in which any tipping of the scale, no matter how slight, dictated the choice of penalty.

1. *People v. Bittaker*, Crim. No. 21942. The jury was given the same instruction as in *Boyde*, and the prosecutor argued as follows:

Now here's the real important paragraph. If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. Now that takes some of the burden off of you. It's not a question of whether you like the death penalty or you don't like it or you're in favor of it or you're opposed to it. You're bound by law, you're bound as jurors to follow the law . . . what this means is, say to give a simple example, if we were to give actual weight in pounds and ounces to the aggravating circumstances and the mitigating circumstances, *if the aggravating circumstances weighed 10 pounds 1 ounce the mitigating circumstances weighed 10*

*1 ounce the mitigating circumstances weighed 10 pounds, then you would be duty bound to impose a death penalty.*¹³

Now obviously I don't think in this case that it's even close. I mean the aggravating circumstances on a scale, they're going to put the scale way down at the bottom and the mitigating circumstances aren't going to make that scale even come off the ground *If you were to give a percentage to it, if you said 50.1% of the evidence pointed to aggravating circumstances and 49.9 pointed to mitigating circumstances, then you still have to impose a sentence of death.*¹⁴ Crim. No. 21942, RT 2549-51 (emphasis supplied).

¹³ The state's prosecutors routinely argued the choice of penalty is dictated for the jurors by the weighing process provided by the law, rather than the jurors' moral evaluation. See, e.g., *People v. Adcox*, Crim. No. 23192 ("You haven't any choice," RT 4606); *People v. Allison*, Crim. No. 24058 ("You must vote for death. The word shall is in the instruction." RT 956); *People v. Bonin*, Crim. No. 23286 ("The applicable standard is 'shall, shall' It doesn't give any discretion once you have found the factors either aggravating or mitigating," RT 10074); *People v. Burton*, Crim. No. 24589 ("you shall. It is mandatory. You don't have any choice about the matter . . ." RT 509); *People v. Clark*, Crim. No. 23019 ("you have no discretion, individually or collectively, the law requires you to impose a sentence of death. Says 'you shall,'" RT 12865); *People v. Gonzalez*, Crim. No. 22136 ("So there is no option, once you do your calculations . . . His Honor said your job is a weighing process. It's not for you to think, 'Well, I think this is an appropriate-type case; no, this is not an appropriate-type case.' That is not for you to decide. Not really." RT 4678-79, 4747); *People v. Howard*, Crim. No. 22641 ("notice in that language the word shall . . . It's mandatory type of language," RT 3088).

¹⁴ California prosecutors similarly pursue with regularity the theme that the penalty jurors' task is a simple and mechanical weighing or balancing process, not a moral evaluative process. See, e.g., *People v. Farmer*, Crim. No. 22960 ("You decide does aggravating outweigh mitigating That is all you decide. The law does the rest." RT 4132-33); *People v. Guzman*, Crim. No. 22418 ("You simply weigh the aggravating factors against the mitigating factors and whichever outweighs the other is the verdict you shall return according to law. . . . It's just that simple. The law lightens your burden in that regard, in the analysis that you go through." RT 1580, 1566); *People v. Sheldon*, Crim. No.

2. *People v. Edelbacher*, Crim. No. 23126. The jury was given the same instruction as in *Boyde*, and the prosecutor argued as follows in his initial presentation to the penalty jury:

[I]f the aggravating circumstances outweigh the mitigating, you're obligated to and you would not be doing the criminal justice system a favor if you said, for example, do we feel in general the death penalty should be applied in this case? That's not the law. The law is to weigh the aggravating circumstances. RT 5173.

The prosecutor further stated in his concluding argument:

You're going to be instructed to weigh these aggravating factors and mitigating factors. And if the aggravating outweigh the mitigating you return the penalty of death. It's as simple as that, and it does not matter what [defense counsel] feels The law says if you consider these aggravating circumstances here and that they outweigh these mitigating circumstances, you shall return the penalty of death. And none of that sympathetic argument that the defendant has tried to offer you in any way can detract from what you're duty will be or should be as a juror in this case. Crim. No. 23126, RT 5220, 5223-24.

3. *People v. Myers*, Crim. No. 21991. The jury was given the same instruction as in *Boyde*, and the prosecutor argued as follows:

(continued from preceding page)

25109 ("It's a very simple concept . . . add up all the factors. . . . If the factors against the defendant outweigh the factors for the defendant, then your duty is to impose the death penalty," RT 2706); *People v. Wade*, Crim. No. 22645 ("[W]hatever outweighs the other is what directs your judgment. . . . It is in essence an uncomplicated process." RT 6453).

You have a scale¹⁵ on this side and a scale over here on this side, and you put the aggravating factors, the weight you attach to them here, and those in mitigation over here and see which one weighs the most. It is that simple.

* * *

Once you determine, once you make a determination as to whether or not the aggravating circumstances or factors outweigh those in mitigation or the mitigating circumstances or factors outweigh those in aggravation, then the law says what verdict you shall return.

You don't make up your mind as to your preference for penalties. All you are doing is weighing, a weighing process; and the law is very explicit.

* * *

If you find the aggravating factors outweigh those in mitigation, it shall be your duty to affix the verdict of the death penalty. You don't determine that. The law has determined that for you. Crim. No. 21991, RT 6446, 6526-27.

¹⁵ Prosecutors have frequently emphasized the simple, mechanical nature of the penalty decision under the challenged instruction by employing the metaphor of a scale to delineate the limited scope of the jury's responsibility. See, e.g., *People v. Hamilton*, Crim. No. 22311 ("You have a scale in front of you. One is for aggravation and one is for mitigation. [I]f . . . that scale tips at all toward the factors in aggravation outweighing the circumstances in mitigation, then you are bound by law to impose the sentence of death in this case." RT19B at 14-15); *People v. Lang*, Crim. No. 24257 ("If the scale goes down on the side of aggravation, the law says there can be only one penalty . . . if you find that scale drops, goes down on the side of aggravation, your duty, I'm afraid it is clear. You must impose the death penalty, even if you don't like it. That's your duty, and you have a duty to follow the law, and I'm confident that you can." RT 2595, 2597); *People v. Marshall*, Crim. No. 23189 ("It is a weighing process. You weigh the mitigating circumstances along with those two aggravating circumstances, and whichever side of the scale balances, or weighs more heavily than the other, that is the way you decide the issue of penalty." RT 8820).

These examples of prosecutors' penalty arguments demonstrate the understanding of the mandatory sentencing instruction on the part of California prosecutors prior to the major restructuring of the sentencing charge in *People v. Brown*. Amicus submits that jurors would similarly have arrived at this understanding of the instruction, and consequently would have performed their sentencing function in an unconstitutionally truncated and mechanical manner.¹⁶

¹⁶ As in Argument I, amicus derives support for the position that reasonable jurors would understand the challenged instruction to restrict their individualized sentencing discretion by reference not only to prosecutorial argument but to other phases of the capital trial proceedings as well. For example, during voir dire the prosecutor in *People v. (John) Brown* told a juror that, "if you determine that the aggravating factors are just a little bit heavier than the mitigating factors, then the law requires you to return a death penalty verdict." He then elicited a commitment from the juror that she could:

look at yourself and say, "okay, . . . I feel these aggravating factors outweigh the mitigating factors, but I am still kind of on the fence about the death penalty. I am not sure about the death penalty, but in my mind I feel aggravation outweighs the mitigation." You will comply with the law and return a death penalty verdict? 46 Cal3d 432, 453 n.9.

Another striking illustration that a penalty jury did in fact understand its sentencing responsibility to be truncated and circumscribed occurred in *People v. Belmontes*, Crim. No. 22810. In that case, without particular prosecutorial prodding, the jury returned to the court during penalty deliberations, declared their extreme difficulty in arriving at a verdict and posed the following question and received the following responses from the court:

JUROR HERN: The statement about the aggravation [sic] and mitigation [sic] of the circumstances, now that was the listing?

THE COURT: That was the listing, yes ma'am.

JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?

THE COURT: That's right, it is a balancing process.
Crim. No. 22810, RT 2501-02 (emphasis supplied).

C. The Capital Sentencing Experience Of Alameda County Demonstrates That The Simplistic Weighing Formula And Mandatory Sentencing Instruction Used At Petitioner's Trial Was Not At All A Proxy For The Constitutionally Required Determination Whether Death Is The Appropriate Punishment.

In this section, amicus presents the striking results of the capital sentencing experience in Alameda County, California, during a period when that county employed a set of capital sentencing instructions and related verdict forms that differed from other California counties that tracked the mandatory sentencing formula set forth in the California Penal Code. As will be shown in detail below, Alameda County, in effect, became a laboratory experiment for testing whether the mandatory sentencing instruction skewed the penalty decision toward death and interfered with the constitutionally correct penalty determination. The penalty verdicts rendered under this modified system demonstrate beyond peradventure that a death penalty decision mandated by a mechanical weighing process is not at all a true reflection of the jury's assessment of the appropriateness of the death penalty based on their overall evaluation of aggravating and mitigating evidence.

In the early 1980's the bench and bar of Alameda County, reacting to growing concern about the constitutionality of the former CALJIC 8.84.2 instruction, modified that instruction to remove its mandatory aspect. Thus, penalty juries were instructed that "if you find that aggravating circumstances outweigh mitigating circumstances, you *may* impose the death penalty." (Emphasis supplied.)

Beginning in 1983, most penalty juries were also given four verdict forms on which they indicated their consensus as to the weight of aggravating circumstances versus mitigating circumstances, in addition to their consensus regarding penalty. The standard four verdict forms read as follows:

1. We, the jury in the above cause, find that although the aggravating factors outweigh the mitigating factors, we fix the punishment of LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

2. We, the jury in the above entitled cause, find the aggravating factors outweigh the mitigating factors and fix the punishment at DEATH.

3. We, the jury in the above entitled cause, find that the aggravating circumstances do not outweigh the mitigating factors and fix the punishment at LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

4. We, the jury in the above entitled cause, find that the mitigating factors outweigh the aggravating factors and fix the punishment at LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE. See verdict forms described in instructions given in *People v. Weston*, Alameda Superior Court No. 74301A, attached hereto as Appendix C.

Amicus has identified nineteen penalty trials in Alameda County from 1983 to 1988, when these instructions and verdict forms (or slight permutations thereof) were used. The results are set forth in the accompanying Table A. Of the fifteen cases in which the jury found that aggravating circumstances outweighed mitigating circumstances under the permissive sentencing instruction, the jury opted for a sentence of death in seven cases.

But the most striking and instructive aspect of this data is that in the *eight* other cases where juries similarly found that *aggravation outweighed mitigation*, they nonetheless opted for a life sentence.¹⁷

The juries' findings in these cases demonstrate quite clearly that a determination that aggravation outweighs mitigation does *not* mean that the jury necessarily, or even usually, believes that death is the appropriate punishment.

Had the mechanical weighing formula and mandatory sentencing instruction used in *Boyd* been given in Alameda County, the eight juries which returned these life verdicts would

¹⁷ In the remaining four cases, the jury found that mitigation either was equal to or outweighed aggravation, and returned a life sentence.

TABLE A

ALAMEDA COUNTY DEATH PENALTY TRIALS
IN WHICH THE JURY WAS GIVEN
FOUR ALTERNATIVE VERDICT FORMS
AND THE JURY'S VERDICT STATED
THE RELATIVE WEIGHT OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES

JURY VERDICT

	<u>DEATH</u>	<u>LWOP</u>
AGGRAVATION OUTWEIGHS MITIGATION	7 ^a	8 ^b
MITIGATION OUTWEIGHS AGGRAVATION		1 ^c
MITIGATION EQUAL TO OR OUTWEIGHS AGGRAVATION		3 ^d

^a The cases in this category are: *People v. Day*, Alameda Superior Ct. No. 076328; *People v. Freeman*, No. 79502A; *People v. Hill*, No. 84675; *People v. Mason*, No. 72839; *People v. Mucham*, No. 76826; *People v. Thomas*, No. 83244; *People v. Wash*, No. H06621. The verdict forms are attached as Appendix D.

^b The cases in this category are: *People v. Barbosa*, Alameda Superior Ct. No. 84803A; *People v. Calderon*, No. 77450; *People v. Delgado*, No. H-4710; *People v. Green*, No. 74716; *People v. Jones*, No. 68289-A; *People v. Quinnell*, No. 79025; *People v. Smith*, No. 77865; *People v. Weston*, Alameda Superior Ct. No. 74301. The verdict forms are attached as Appendix E.

^c The case in this category is *People v. Pope*, Alameda Superior Ct. No. 67995. The verdict form is attached as Appendix F.

^d The cases in this category are: *People v. Buckley*, Alameda Superior Ct. No. 76678; 79066; *People v. Domino*, No. H-3319; *People v. Gonzalez*, No. H-2910. The verdict forms are attached as Appendix G.

have been *required* to return a death verdict, albeit manifestly *against* their actual judgment that life was the appropriate sentence. The Alameda County sentencing experience reveals that in a substantial number of cases, juries find that aggravation outweighs mitigation but their reasoned moral response to the overall import of the evidence is that a life- without- parole sentence is appropriate. That reasoned moral response is drastically inhibited, if not entirely precluded, under the mandatory sentencing instruction.

CONCLUSION

The instructions given at petitioner's penalty trial unconstitutionally limited the jury's consideration of his mitigation evidence, and then they compelled the jury to make its life-or-death decision based upon a mechanical weighing of aggravation versus what remained of his mitigation. There is thus an extreme "risk that the death penalty [was] imposed in spite of factors which may call for a less severe punishment," *Lockett v. Ohio*, 438 at 605, and the Eighth and Fourteenth Amendments require that petitioner's death sentence be set aside.

Respectfully submitted,

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APPENDICES

APPENDIX A

**Former CALJIC No. 8.84.1 and
the 1984, 1986 and 1988 Revisions Thereof**

CALJIC 8.84.1 [4th ed. 1979]

**PENALTY TRIAL - FACTORS FOR
CONSIDERATION**

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed.] You shall consider, take into account and be guided by the following factors, if applicable:

- (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.
- (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
- (c) The presence or absence of any prior felony conviction.
- (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
- (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [sic] of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC 8.84.1 (1984 Revision)

PENALTY TRIAL - FACTORS FOR CONSIDERATION

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed.] You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death.]

CALJIC 8.84.1 (1986 Revision)

PENALTY TRIAL - FACTORS FOR CONSIDERATION

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed.] You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle].

CALJIC 8.85

PENALTY TRIAL - FACTORS FOR CONSIDERATION

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle].

APPENDIX B

**Former CALJIC 8.84.2 and
the 1986 and 1988 Revisions Thereof**

PENALTY TRIAL - CONCLUDING INSTRUCTION

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [each] defendant.

You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

[In this case you must decide separately the question of the penalty of each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] [all] defendants, but do agree as to the penalty of one [or more] of them, you must render a verdict as to the one [or more] on which you do agree.]

You shall now retire and select one of your number to act as foreman, who will preside over your

deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it to this courtroom.

CALJIC 8.84.2 (1986 Revision)

**PENALTY TRIAL - CONCLUDING
INSTRUCTION**

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [each] defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

[In this case you must decide separately the question of the penalty of each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] [all] defendants, but do agree as to the penalty of one [or more] of them, you must render a verdict as to the one [or more] on which you do agree.]

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it to this courtroom.

CALJIC 8.88

PENALTY TRIAL - CONCLUDING INSTRUCTION

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [the] [each] defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

[In this case you must decide separately the question of the penalty of each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] [all] defendants, but do agree as to the penalty of one [or more] of them, you must render a verdict as to the one [or more] on which you do agree.]

You shall now retire and select one of your number to act as foreperson, who will preside over your

deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

APPENDIX C

**Excerpt From Penalty Phase Jury Instructions
In People v. Weston, Alameda Superior Court No. 74301A**

See materials lodged with the Court.

APPENDIX D

Jury's Penalty Phase Verdicts in
People v. Day, Alameda Superior Ct. No. 076328;
People v. Freeman, No. 79502A;
People v. Hill, No. 84675;
People v. Mason, No. 72839;
People v. Mitcham, No. 76826;
People v. Thomas, No. 83244;
People v. Wash, No. H06621.

See materials lodged with the Court.

APPENDIX E

Jury's Penalty Phase Verdicts in
People v. Barbosa, Alameda Superior Ct. No. 84803A;
People v. Calderon, No. 77450;
People v. Delgado, No. H-4710;
People v. Green, No. 74716;
People v. Jones, No. 68289-A;
People v. Quinnell, No. 79025;
People v. Smith, No. 77865;
People v. Weston, No. 74301.

See materials lodged with the Court.

APPENDIX F

**Jury's Penalty Phase Verdicts in
People v. Pope, Alameda Superior Ct. No. 67995**

See materials lodged with the Court.

APPENDIX G

Jury's Penalty Phase Verdicts in
People v. Buckley, Alameda Superior Ct. Nos. 76678, 79066;
People v. Domino, H-3319;
People v. Gonzalez, No. H-2910

See materials lodged with the Court.

NO. 88-6613

Supreme Court, U.S.

FILED

SEP 10 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
Term, 1988

RICHARD BOYDE,

Petitioner,

-vs-

STATE OF CALIFORNIA,

Respondent,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

BRIEF AMICI CURIAE STATE OF ARIZONA,
JOINED BY THE STATES OF ALABAMA,
MISSOURI, MONTANA, NORTH CAROLINA,
OHIO, PENNSYLVANIA AND WYOMING.

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QUESTION PRESENTED

May a death penalty instruction guide and channel the sentencer's discretion by requiring that the death penalty be imposed if the aggravating circumstances outweigh the mitigating circumstances?

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INTEREST OF AMICI CURIAE

Amici curiae are states that have adopted sentencing schemes that provide that the sentencing authority must impose a sentence of death if it determines that the aggravating circumstances outweigh the mitigating circumstances. California has a similar procedure; petitioner is asking this Court to declare that procedure unconstitutional. Amici curiae have an interest in this issue because this Court's ruling on the California procedure will affect the validity of the sentencing procedures in our states.¹

SUMMARY OF ARGUMENT

California's jury instruction required the sentencer to impose the death penalty if it found that the

1. This Court is presently reviewing a similar attack on Pennsylvania's death penalty statute in Blystone v. Pennsylvania, No. 88-6222.

aggravating circumstances outweighed the mitigating circumstances. This Court has held that the Eighth Amendment requires that a death penalty statute narrow the class of death penalty-eligible offenders, and that the sentencer make an individualized determination regarding the proper sentences by considering all mitigating evidence. However, contrary to petitioner's argument, this Court's cases do not require that the sentencer have "unbridled discretion" in finally determining the appropriate penalty.

Amici submit that no one system for imposing the death penalty is, or should be, preferred over any other valid system. Amici urge this Court to uphold the jury instruction given in petitioner's case, not because it is constitutionally compelled, but solely because it is not constitutionally prohibited.

ARGUMENT

THE CALIFORNIA JURY INSTRUCTION PROPERLY REQUIRED THAT THE DEATH PENALTY BE IMPOSED IF AGGRAVATING CIRCUMSTANCES OUTWEIGHED MITIGATING CIRCUMSTANCES.

Petitioner contends that the California jury instruction requiring the jurors to impose a sentence of death if they conclude that the aggravating circumstances outweigh the mitigating circumstances, creates a mandatory sentencing scheme and is thus unconstitutional. In 1976, this Court reviewed five death penalty cases. In the three cases upholding the "guided-discretion" statutes, the opinions emphasized that those schemes permitted the sentencing authority to consider relevant mitigating circumstances pertaining to the offense, and a range of factors concerning individual defendant. Gregg v. Georgia, 428 U.S. 153, 197 (1976); Proffitt v.

Florida, 428 U.S. 242, 251-52 (1976);
Jurek v. Texas, 428 U.S. 262, 270-71
(1976). This Court declared two
mandatory sentencing schemes
unconstitutional. The opinions stressed
they were fatally flawed by their failure
to permit presentation of mitigating
circumstances for the consideration of
the sentencing authority. Woodson v.
North Carolina, 428 U.S. 280, 303-05
(1976); Roberts (Stanislaus) v.
Louisiana, 428 U.S. 325, 333-34 (1976).
Thus, the constitutional mandate found in
these capital cases is that "it is
constitutionally required that the
sentencing authority have information
sufficient to enable it to consider the
character and individual circumstances of
a defendant prior to imposition of a
death sentence." Sumner v. Shuman, 483
U.S. 66, _____, 107 S. Ct. 2416, 2720;
Gregg, 428 U.S. at 189 n.38.

So long as the sentencing scheme meets these requirements, it is constitutional.

The jury instruction given in California is a proper application of this Court's pronouncement on permissible sentencing procedures. The instruction narrows the class of death penalty-eligible offenders and provides for consideration of all mitigating evidence, including evidence relating to the circumstances of the offense. Former Caljic 8.84.2. The instruction required the jurors to impose the death sentence if they found that the aggravating circumstances outweighed the mitigating circumstances. By allowing the jurors to consider all relevant evidence in mitigation and then instructing them to impose a sentence of death if the aggravating circumstances outweigh the mitigating circumstances, this instruction allows for the individual

consideration required, and at the same time avoids the arbitrary selection of those condemned to death that this Court rejected in Furman v. Georgia, 408 U.S. 238 (1972).

Petitioner argues that this provision of the instruction is unconstitutional because it creates a "mandatory death penalty" that precludes individualized sentencing based on the circumstances of the offense and the offender.

Petitioner's argument is an unwarranted extension of this Court's jurisprudence. Once a state establishes a rational scheme for the discretionary consideration of aggravating and mitigating factors, further federal review is unnecessary. Petitioner's argument would engraft a third requirement of "unbridled discretion" for sentencers.

As recently as 1988, this Court held that the Constitution requires no more

than that death penalty statutes narrow "the class of death-eligible murderers," and then at the sentencing phase allow for the consideration of mitigating circumstances and the exercise of discretion. Lowenfield v. Phelps, ___ U.S. ___, 108 S. Ct. 546, 555 (1988). This Court has never indicated that the states must guide the exercise of discretion in a certain way or, as petitioner apparently contends, permit that exercise of discretion to be unbridled. "Much in our cases suggests just the opposite." Franklin v. Lynaugh, ___ U.S. ___, 108 S. Ct. 2320, 2331 (1988) (White, J.).

Initially, it must be noted that the California jury instruction is not the type of "mandatory" scheme first condemned by this Court in Woodson v. North Carolina, 428 U.S. 280 (1976). Unlike the "mandatory" statutes

invalidated by this Court, California law permits consideration of all mitigating evidence. People v. Melton, 44 Cal. 3d 713, 761, 244 Cal. Rptr. 867, 750 P.2d 741, cert. denied, 109 S. Ct. 329 (1988). Furthermore, unlike the true "mandatory" statutes this Court denounced in Woodson, California's law is consistent with the Eighth Amendment requirement that the death penalty be imposed in a rational and non-arbitrary fashion. Furman v. Georgia, 408 U.S. 238 (1972). Prior to Furman v. Georgia, capital sentencers had unbridled discretion in determining penalty. McGautha v. California, 402 U.S. 183 (1971). However, in Furman, this Court declared such total discretion unconstitutional because it led to irrational and arbitrary results. Gregg v. Georgia, 428 U.S. 153, 188 (1976), citing Furman v. Georgia, 408 U.S. 238 (1972). Since Furman, this Court has "identified a

constitutionally permissible range of discretion in imposing the death penalty." McCleskey v. Kemp, 481 U.S. 279, 305 (1987). That permissible range falls between "a required threshold below which the death penalty cannot be imposed" and the requirement that the sentencer consider all mitigating evidence. Id. at 305-06; see also California v. Brown, 479 U.S. 538, 541 (1987).

This Court has merely indicated that it will tolerate "unbridled discretion" once a sentencer has determined that a murderer has crossed the threshold of death penalty eligibility and has considered all mitigating evidence.

[T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that states cannot channel jury discretion in capital sentencing in an effort to

achieve a more rational and equitable administration of the death penalty."

Franklin v. Lynaugh, 108 S. Ct. at 2331 (White J.).

It is understandable why states choose to channel the discretion of sentencers in considering the circumstances and determining the final penalty. This Court invalidated death penalty statutes in 1972 because the sentencing procedures then in effect created a substantial risk that the death penalty would be inflicted in an "arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. at 188, citing Furman v. Georgia, (emphasis added). Channeling a sentencer's discretion can serve the "useful purpose" of precluding consideration of extraneous emotional factors unrelated to the evidence. See California v. Brown, 479 U.S. at 543. Furthermore, states can ensure that the

death penalty will be imposed "with regularity," rather than "freakishly or rarely." Proffitt v. Florida, 428 U.S. 242, 260 (1976) (White, J. concurring); Jurek v. Texas, 428 U.S. 262, 278-79 (1976) (White, J. concurring). The channeling of sentencer discretion can "minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. at 189. Such schemes promote the rational and predictable administration of death penalty laws. California v. Brown, 479 U.S. at 541. Standards for the consideration of all evidence provide a "meaningful basis for distinguishing the few cases in which the [death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. at 238 (White, J. concurring). They also foster reliability in further judicial review. California v. Brown, 479 U.S. at 543.

These schemes do not sacrifice the requirement that death sentencing be individualized because they do not preclude the admission and consideration of any relevant mitigating evidence. As a practical matter, sentencers will be aware of the consequences of their weighing of the aggravating and mitigating circumstances. Franklin v. Lynaugh, 108 S. Ct. at 2331 n.12 (White, J.). The "weighing" process does not eliminate subjectivity, but it does set "clear and objective" standards to minimize discrimination. Gregg v. Georgia, 428 U.S. at 189, 198.

Finally, these "weighing" statutes resolve any "tension" that may exist between the Eighth Amendment requirements that the death penalty be imposed in a rational manner, and that the sentencer consider all potential mitigating evidence. Franklin v. Lynaugh,

108 S. Ct. at 2331 (White, J.), citing California v. Brown, 479 U.S. at 544 (O'Connor, J. concurring). Since these statutes do not preclude consideration of any mitigating evidence, they protect the Eighth Amendment interest by ensuring that the death penalty is "appropriate" in a particular case. Woodson v. North Carolina, 428 U.S. at 305 (Stewart, J.). Yet, by requiring that the death penalty then be imposed if the aggravating circumstances outweigh mitigating circumstances, these statutes also promote the Eighth Amendment requirement that the capital sentencing decision be a "reasoned moral response" to the evidence. Penry v. Lynaugh, ___ U.S. ___, 57 U.S.L.W. 4958, 4965 (1989).

In Proffitt v. Florida, this Court approved a statute that required imposition of the death penalty if the aggravating circumstances outweighed the

mitigating circumstances. Florida has interpreted its statute as compelling a death judgment in the absence of mitigating circumstances. Barclay v. Florida, 463 U. S. 939, 961-62 (1983) citing Cooper v. State, 336 S.2d 1133, 1142 (Fla. 1976), cert. denied, 431 U.S. 925 (1977) (Stevens, J. concurring); see also Woodson v. North Carolina, 428 U.S. 280, 315 (1976) (Rehnquist, J. dissenting); Roberts v. Louisiana, 428 U.S. 325, 362 n.8 (1976) (White, J. dissenting). The concurrence in Proffitt praised the Florida statute because it "required" the sentencer to impose the death penalty if aggravating circumstances outweighed mitigating circumstances. Proffitt v. Florida, 428 U.S. at 260-61 (White, J. concurring). When this Court again approved Florida's statute in Barclay v. Florida, that state still interpreted its statute as establishing a

rebuttable "presumption" of death.

Barclay v. Florida, 463 U.S. at 961-62
citing Williams v. State, 386 S.2d 538,
543 (Fla. 1980) (Stevens, J. concurring).

This Court has likewise approved the Texas death penalty scheme. Jurek v. Texas, 428 U.S. 262 (1976). That statute required that the death sentence be imposed if the sentencer answered three questions about the defendant in the affirmative. This Court approved the statute because it narrowed the class of death penalty-eligible murderers and because it permitted the sentencer to consider all mitigating circumstances. 428 U.S. at 270-76 (Stewart, J.). The concurrence in Jurek noted that the sentencer "must" impose the death penalty if it answered the questions affirmatively and that the statute did "not extend to juries discretionary power to dispense mercy. . . ." 428 U.S. at 279 (White, J.

concurring); see also Woodson v. North Carolina, 428 U.S. at 315 (Rehnquist, J. dissenting); Roberts v. Louisiana, 428 U.S. at 359 (White, J. concurring). Franklin v. Lynaugh, reaffirmed the constitutionality of Texas' death penalty scheme on the assumption that the statute permitted consideration of all mitigating evidence. 108 S. Ct. at 2330-32 (O'Connor, J. concurring).²

2. This Court's recent opinion in Penry v. Lynaugh, ___ U.S. ___, 57 U.S.L.W. 4958 does not affect this analysis. In Penry, this Court merely held that Texas juries must be permitted to consider and give effect to mitigating evidence without being restricted by the three "special issues" that Texas juries must answer affirmatively to impose the death penalty. Penry is no more than an extension of the line of cases beginning with Jurek v. Texas, and Woodson v. North Carolina, that require sentencers to consider and give independent weight to all relevant mitigating evidence in order to ensure that the death penalty is "appropriate." That, of course, is a question separate from the one presented in this case -- whether states may guide and channel the decision that follows the consideration of that evidence. In fact, this Court merely held "there is no constitutional infirmity in a procedure that allows a jury to recommend mercy

Taking their cue from this Court, many states have chosen to follow the approach of channeling and guiding the sentencer's consideration of aggravating and mitigating circumstances. For instance, Arizona law requires imposition of the death penalty if the sentencer (the trial judge) finds one aggravating factor and no mitigating factors substantial enough to call for leniency. Ariz. Rev. Stat. Ann. § 13-703(E). The Arizona courts have interpreted this formula as requiring the imposition of the death sentence if aggravating circumstances qualitatively outweigh mitigating circumstances. State v.

based on the mitigating evidence." 57 U.S.L.W. at 4964. Once again, this Court is merely indicating that it will tolerate such discretion. Penry must be analyzed in the context of the peculiar Texas statute. Its holding cannot be extended to other states, such as California, which already permit full consideration of all mitigating evidence.

Gretzler, 135 Ariz. 42, 659 P.2d 1, 13-14, cert. denied, 461 U.S. 971 (1983). This requirement means that "a defendant will stand the same chance of receiving the death penalty from a judge who does not philosophically believe in the death penalty as from a judge who does." State v. Beaty, 158 Ariz. 232, 762 P.2d 519, 534 (1988), cert. denied, 109 S. Ct. 3200 (1989). Thus, the death penalty "is then reserved for those who are above the norm of first-degree murderers or whose crimes are above the norm of first-degree murders, as the legislature intended." (Id.)³

New Jersey mandates a death penalty if the aggravating factors outweigh

3. The Arizona death penalty formula was declared unconstitutional by the Ninth Circuit in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988). Arizona's petition for writ of certiorari is currently pending before this Court in Ricketts v. Adamson, (No. 88-1553).

mitigating factors. However, such a law is "hardly the automatic imposition of death found unconstitutional in [Woodson]" since New Jersey law permits consideration of all mitigating factors. State v. Price, 195 N.J. Super 285, 478 A.2d 1249, 1254-1255 (1984). The New Jersey courts have noted that this Court has never required a so-called "mercy" provision. Id. New Jersey has rejected the argument that the jurors should also decide explicitly that death is the "appropriate" penalty since the vagueness of that term would "undermin[e] the principle, also constitutionally mandated, that the death sentence be meted out in a manner that is not arbitrary or capricious." State v. Ramseur, 106 N.J. 123, 524 A.2d 188, 287 n.81 (1987).

Illinois requires imposition of the death penalty if there are no mitigating

factors sufficient to preclude that punishment. This finding "is synonymous with a finding that death is the appropriate penalty." People v. Montgomery, 122 Ill. 517, 494 N.E.2d 475, 482 (1986), cert. denied, 479 U.S. 1101 (1987).

Maryland courts have also rejected the argument that jurors should be instructed that they may impose a life sentence without regard to the relative weights of aggravating and mitigating factors. Otherwise, "there would be no principled or rational way to differentiate the few cases in which the death penalty is justified from the many in which it is not." People v. Tichnell, 306 Md. 428, 509 A.2d 1179, 1999, cert. denied, 479 U.S. 995 (1986). Such an instruction would permit "unguided discretion." Grandison v. State, 305 Md. 685, 506 A.2d 580, 616, cert. denied, 479 U.S. 873 (1986).

Ohio requires the jurors to recommend the death penalty to the court if aggravating factors outweigh mitigating factors beyond a reasonable doubt. Since Ohio law permits the introduction of any relevant mitigating factors, Ohio courts have found that this system comports with the Eighth Amendment. State v. Jenkins, 15 Ohio St.3d 164, 473 N.E.2d 264, 280-281 (1984), cert. denied, 472 U.S. 1032 (1985), discussing Barclay v. Florida, 463 U.S. at 958 (Stevens, J. concurring).

Tennessee has upheld its analogous death penalty law, since its statute requires the sentencer to consider all mitigating factors. State v. Dicks, 615 S.W.2d 126, 131 (Tenn.), cert. denied, 454 U.S. 933 (1981).

The Pennsylvania Supreme Court in Commonwealth v. Peterkin, 513 A.2d 373, 387-88 (Penn.), cert. denied, 479 U.S. 1070 (1986), held that the channelling of

considerations of mercy and leniency into a scheme of aggravating and mitigating circumstances was consistent with Furman. By limiting the discretion of the sentencing body, the court found the Pennsylvania sentencing scheme minimized the risk of wholly arbitrary and capricious action. Commonwealth v. Peterkin, 513 A.2d at 388; see also Commonwealth v. Blystone, 549 A.2d 81 (Penn. 1988), cert. granted, 109 S. Ct. 1567 (1989).

The State of Washington requires that the death penalty be imposed if "there are not sufficient mitigating circumstances to merit leniency." State v. Jeffries, 105 Wash.2d 398, 717 P.2d 722, 737 (1986). Washington has rejected the argument that this statute imposes a "mandatory" death penalty in violation of Woodson, since the statute allows for jury discretion in considering all mitigating factors. However, once the

jurors have exercised that discretion, "[i]t is only at this point that the death penalty becomes mandatory. . . . The result is that the penalty of death is not arbitrarily or capriciously imposed, but instead is imposed in a just manner." 717 P.2d at 738; see also Campbell v. Kincheloe, 829 F.2d 1453, 1466 (9th Cir. 1987), cert. denied, 102 L. Ed. 2d 369 (1988).

Montana's law is similar to Washington's in requiring a death penalty if there are no mitigating circumstances sufficiently substantial to call for leniency. People v. Coleman, 605 P.2d 1000, 1016 (1979), cert. denied, 446 U.S. 970 (1980). However, Montana has held that such a scheme is not an unconstitutional mandatory statute, since Montana's statute requires its sentencers to consider all facts existing in mitigation. 605 P.2d at 1017; see also McKenzie v. Risley, 842 F.2d 1525, 1543

(9th Cir.), cert. denied, 109 S. Ct. 250 (1988).

These states have chosen, along with California, to provide guidance and direction to its sentencers. Nothing in this Court's precedents militates against that choice. Indeed, an analysis of this Court's decisions indicates that the Eighth Amendment encourages these states' choice of action.

To argue that California's jury instruction is unconstitutional, petitioner twists this Court's jurisprudence inside out. He transforms permission to have "unbridled discretion" into a prohibition of any channelization of sentencer discretion whatsoever. In doing so, he advocates that a third federal requirement be added that would mandate that the sentencing discretion be unbridled, and to do so would preclude legitimate state efforts to direct and

guide sentencers in a rational and equitable fashion.⁴

This Court has long recognized the limited and specific nature of its responsibility when reviewing a capital punishment scheme. Gregg v. Georgia, 428 U.S. at 195. Amici expect that whatever the Court's decision in this case, it will generate renewed attacks on each of the statutory schemes authorizing

4. The Amicus brief filed on behalf of petitioner emphasizes the problem with a statutory scheme that allows for "unbridled discretion." Petitioner's Amicus proudly boasts that in Alameda County, California, in over half of the cases where the jurors found that the aggravating circumstances outweighed the mitigating circumstances and were allowed unbridled discretion, the jurors elected to impose life. Such evidence supports the position of respondent. If the jurors consider all relevant mitigation and determine that it does not outweigh the aggravating circumstances proved by the state, the imposition of a life sentence is either an arbitrary decision in violation of Furman, or based on the inappropriate consideration of irrelevant mitigation (i.e. race of accused, race of the victim, social status of the victim, etc.) in violation of California v. Brown, 479 U.S. at 543.

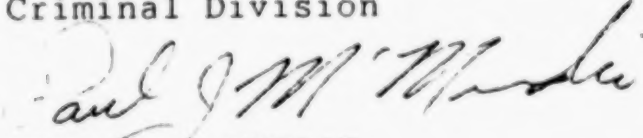
the death penalty. We urge the Court, therefore, not only to uphold the sentencing scheme in California, but also to reaffirm the position it took in Pulley v. Harris, 465 U.S. 37, 45 (1984): to endorse the principle as a whole "is not to say that anything different is unacceptable."

CONCLUSION

Amici curiae request this Court to
affirm the judgment of the Supreme Court
of the State of California.

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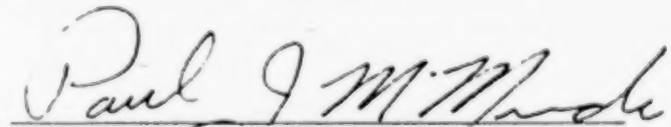
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD BOYDE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the California
Supreme Court

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

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Questions Presented

1. Was the jury in this case, given the totality of instructions, argument and evidence, adequately informed that it could consider all of the mitigating evidence?

2. Should this Court construe the Eighth Amendment to forbid any channeling of the sentencer's discretion to grant a life sentence at the final stage of capital sentencing, overruling *Jurek v. Texas*, 428 U. S. 262 (1976)?

This brief *amicus curiae* will address only question 2.

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society.

Defendant in this case seeks a declaration that the people of a state are constitutionally powerless to specify, in general terms and with due regard for any mitigating circumstances, the type of offense and offender for which a death sentence is appropriate. Instead, he claims, the jurors must have unlimited discretion to vote for a life sentence based only on their personal notions.

Such a haphazard system would deny society due process of law and deny victims the equal protection of the laws. It would be contrary to the purpose for which CJLF was founded. CJLF therefore has a substantial interest in this case.

SUMMARY OF FACTS AND CASE

Defendant petitioner Richard Boyde is a habitual criminal. Witnesses at trial testified to *eight* robberies of convenience stores, a doughnut shop, and a gas station committed by Boyde over a five-year period. *People v. Boyde*, 46 Cal.3d 212, 222, 242, 247, 758 P. 2d 25 (1988). In three of these robberies Boyde kidnapped the victim. *Id.*, at 222, 228, 242. In the last robbery, Boyde killed Dickie Gibson by shooting him twice in the head, once at close range, in order to prevent Gibson from identifying him. *Id.*, at 222-23, 228-29, 231.

The jury sentenced Boyde to death, and the Supreme Court of California affirmed. Among the contentions rejected by that court were that the instruction to consider "any other circumstance which extenuates the gravity of the crime" did not permit the jury to consider Boyde's unhappy childhood, etc., *id.*, at 250-51, and that the instruction on weighing aggravating and mitigating circumstances did not properly inform the jury of the scope of its discretion, *id.*, at 252-255. The court divided 4-3 on the second point. See *id.*, at 257 (Arguelles, J., dissenting).

SUMMARY OF ARGUMENT

Defendant's first argument was not accepted by any of the Justices of the California Supreme Court and is fully refuted by the brief of the Attorney General. This brief amicus curiae will therefore be limited to the second question.

The question of whether a state can preclude the sentencer's reception or consideration of mitigating evidence is a separate question from whether the state can channel the sentencer's consideration of that evidence. Nothing in this Court's precedents precludes such

guidance, several cases uphold it, and there is a substantial body of opinion that channeling is constitutionally *required*.

While a state cannot decide in advance that as a matter of state policy a particular aggravating circumstance necessarily outweighs any and all mitigating circumstances, a state can and should state its policy as to which aggravating circumstances warrant a death sentence in the absence of mitigating circumstances.

While the sentencing determination should be individualized to the defendant, it is neither necessary nor desirable to allow one jury to sentence according to standards that differ from those used by another jury. Therefore, this Court should encourage, not prohibit, the establishment of uniform standards for capital sentencing.

There is substantial reason to believe that the rule defendant seeks would exacerbate the problem of biased sentencing based on the race of the victim. This Court should not preclude a structuring of sentencing discretion which may prove useful in combating racial discrimination.

ARGUMENT

I. Consideration of all mitigating evidence does not require unlimited discretion in applying that evidence.

A. *The Decline of Standardless Discretion (Scylla).*

The defense argument in this case "turns the law on its head to conclude, apparently, that *because* a decision to take someone's life is of such tremendous import, those who make such decisions [must] not be 'inhibit[ed]' by the safeguards otherwise required by due process of law." *McGautha v. California*, 402 U. S. 183, 309 (1971) (Brennan, J., dissenting). In so arguing, the defense seeks to take capital punishment virtually back to the starting point: where it was at the time of *McGautha*.

In *McGautha*, this Court upheld the prior California law of standardless discretion against a Fourteenth Amendment challenge. There were three dissenting votes.

"California fails to provide any means whereby the fundamental questions of state policy with regard to capital sentencing may be authoritatively resolved. They have not been resolved by the state legislature, which has committed the matter entirely to whatever[] judge or jury may exercise sentencing authority in any particular case." *Id.*, at 305 (dissent).

The approach of the *McGautha* dissent was accepted for all practical purposes in *Furman v. Georgia*, 408 U. S. 238 (1972). In *Furman*, the "position taken by those Members who concurred in the judgments on the narrowest grounds," *Gregg v. Georgia*, 428 U. S. 153, 169, n. 15 (1976),¹ "focus[ed] on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted." *Id.*, at 179.

To avoid the "imprisonment" of the *McGautha* holding, *Furman*, 408 U. S., at 248 (opinion of Douglas, J.), Justices Douglas, Stewart and White pounded the square pegs of equal protection and due process into the round hole of the Eighth Amendment. Never before had the question of whether a punishment was cruel or unusual for a given crime depended upon the *procedure* by which it was imposed. Justice Douglas was the most explicit about the equal protection basis of his opinion. *Id.*, at 249, 256-57.² Justice Stewart's opinion was based on the belief that the penalty as then administered was "cruel and unusual in the same way that being struck by lightning is cruel and unusual," and that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.*, at 309-310. Justice White's opinion was

1. Citations to *Gregg* and its companion cases are to the joint opinions of Justices Stewart, Powell and Stevens unless otherwise noted.

2. He also noted the "tension" between *Furman* and *McGautha*, *id.*, at 248-49, n. 11, an understatement.

based on the lack of a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.*, at 313.

These opinions represent much more than mere "tension" with *McGautha*. The holding of the *Furman* court pieced together from these opinions is a *sub silentio* overruling of *McGautha* and an adoption of the dissent in that case. The nominal placement of the *Furman* rule under the Eighth Amendment instead of the Fourteenth makes no difference. Whether the constitutional value protected is due process, equal protection or freedom from cruel and unusual punishment the principle is the same: similarly culpable criminals should receive similar punishments, and unguided discretion fails to meet the requirement.

Whichever clause is invoked, the problem is *not* to mandate the procedure which will produce the minimum number of death sentences. See *McGautha*, 402 U. S., at 305 (Brennan, J., dissenting). The problem is to "make certain that no State takes one man's life for reasons that it would not apply to another." *Id.*, at 306.

B. The Disapproval of Mandatory Sentencing (*Charybdis*).

In response to *Furman*'s concern for uniformity in sentencing, mandatory sentencing laws were enacted by ten states, see *Woodson v. North Carolina*, 428 U. S. 280, 313 (1976) (Rehnquist, J., dissenting). However, the *Woodson* court found three deficiencies in this approach, and it is this case that is the genesis of defendant's attack on the California statute.

The first reason for *Woodson* was the general rejection by society, prior to *Furman*, of mandatory sentences. 428 U. S., at 288, 301. That consensus is clearly inapplicable to the much more limited post-*Furman* question of whether a death penalty can be required upon specific penalty-phase findings which consider all mitigating circumstances.

The second deficiency of the statute in *Woodson* was that the vast sweep of the mandatory death penalty in that statute made widespread jury nullification inevitable. When the jury is deprived of any legitimate means of expressing its strong view that a particular defendant not be put to death, some juries will disobey their instructions and some will obey them. The resulting random pattern of sentences "does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with *objective standards to guide, regularize, and make rationally reviewable* the process for imposing a sentence of death." *Id.*, at 303 (italics added).

The third constitutional shortcoming found by the *Woodson* plurality goes to the core of the present dispute. The plurality held that "consideration of the character and record of the individual offender and the circumstances of the particular offense [are] a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304. The absence of any authority for this constitutional rule did not go unnoticed. *Id.*, at 321 (Rehnquist, J., dissenting). We are too far down the road, however, for this Court to overrule this prong of *Woodson*. What must be done instead is to insure that this rule is not expanded to such a scope that it nullifies the anti-discriminatory progress made since *Furman*.

There has been some disagreement among the Members of this Court as to whether there is "tension" between *Furman* and the progeny of the third prong of *Woodson*.³ See *California v. Brown*, 479 U. S. 538, 544 (1987) (O'Connor, J., concurring); *Franklin v. Lynaugh*, 108 S. Ct. 2320, 2331, 101 L. Ed. 2d 155, 171 (1988) (plurality); *id.*, at 2338, L. Ed. 2d, at 180 (Stevens, J., dissenting). Whether the task is characterized as accommodating the tension or avoiding the creation of tension, see *Franklin*, 108 S. Ct., at 2340, 101 L. Ed.

3. The progeny are *Lockett v. Ohio*, 438 U. S. 586 (1978), *Eddings v. Oklahoma*, 455 U. S. 105 (1982), *Skipper v. South Carolina*, 476 U. S. 1 (1986), *Hitchcock v. Dugger*, 481 U. S. 393 (1987), *Sumner v. Shuman*, 483 U. S. 66 (1987), *Mills v. Maryland*, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) and *Penry v. Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

2d, at 182 (Stevens, J., dissenting), the task remains vitally important. The "all mitigating evidence" requirement must not be expanded to the point where the states are prohibited from guiding and channeling the sentencer's discretion.

In addition, the states should not be restricted to the bare constitutional minimum in their efforts "to promote the even-handed, rational, and consistent imposition of death sentences under law." See *Jurek v. Texas*, 428 U. S. 262, 276 (1976). If a state wants to provide more guidance in an effort to seek more evenhandedness than this Court has required, the *Woodson* rule should not be expanded to the point where it stands in the way of that salutary effort.

The proper scope of the *Woodson* rule is best seen by comparing the statute in that case with the other systems approved and disapproved by this Court on the same day. The results in these five cases seem to depend on the answers to three questions. First, is the category of death-eligible defendants narrowed to the point where death is not such a rare penalty within that category as to be wanton or freakish? See *Gregg v. Georgia*, 428 U. S. 153, 206-207 (1976). Second, is the sentencer permitted to consider all "relevant facets of the character and record of the individual offender [and] the circumstances of the particular offense." *Woodson*, 428 U. S., at 304. Third, is the sentencer permitted sufficient discretion to avoid the problem of random jury nullification identified in *Woodson*, 428 U. S. at 303, but not so much as to result in the arbitrariness condemned in *Furman*.⁴

4. A six-member majority of this Court summed up these rules this way in *Lowenfield v. Phelps*, 108 S. Ct. 546, 555, 98 L. Ed. 2d 568, 583 (1988): "There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more." In light of the approving discussion of *Jurek* which preceded this statement, *id.*, at 554, L. Ed. 2d, at 582, however, the Court clearly did not mean that unlimited discretion was required.

The Georgia system of narrowing the class by finding a statutory aggravating circumstance, followed by a sentencing hearing with unlimited discretion and an appellate proportionality review, was deemed to comply. *Gregg*, 428 U. S., at 196-98. So was the Florida system, which directed a balancing of mitigating against aggravating factors. *Proffitt v. Florida*, 428 U. S. 242, 248-53 (1972). The Texas system of narrowing the definition capital murder and basing the sentence solely upon the jury's response to three specific, fact-based questions was approved for reasons discussed further below. *Jurek*, 428 U. S., at 268-74. Mandatory systems imposing the death penalty for conviction of first degree murder, *Woodson*, *supra*, or a narrowed class of first-degree murder, *Roberts v. Louisiana*, 428 U. S. 325, 332 (1972), were struck down.

C. Consideration of All Mitigating Evidence.

In analyzing the "all mitigating evidence" question, it is instructive to consider the North Carolina statute struck down in *Woodson* together with the Texas statute upheld in *Jurek*. As noted above, North Carolina had made the death penalty mandatory for all first-degree murderers, while Texas had narrowed the definition of "capital murder" and, with no mention of mitigating circumstances, required a death sentence upon affirmative answers to three questions regarding deliberateness, future dangerousness, and unreasonable response to any provocation. Neither statute, on its face, allows the sentencer any discretion. "The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedure turns on whether the enumerated questions allow *consideration* of particularized mitigating factors." *Jurek*, 428 U. S., at 272 (*italics added*).

Conspicuous by its absence from *Jurek*'s statement of the question is any requirement that the sentencer have *unlimited* discretion to grant a life sentence once it had considered those particularized mitigating factors. The *Jurek* court upheld the statute on the basis of an assurance from the Texas Court of Criminal Appeals "that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to

show." *Ibid.* There is no trace of any similar assurance that the jury would be authorized to answer the question "no," even if it believed the correct answer to be "yes" on the basis of the evidence presented, simply because of the personal opinions of the jurors that death is not the "appropriate" sentence for the defendant. By no stretch of the imagination could the Texas system be thought to authorize such a response.

The distinction between *Woodson* and *Jurek*, then, lies *only* in the ability or inability of the jurors to consider all mitigating evidence without violating their oaths. In *Jurek* the jurors were deemed to be able to take such evidence into account in arriving at their answers to the statutory questions, while in *Woodson* they were not. The cases are identical, however, in that once the questions are answered it is the statute and not the whim of the jurors that determines the sentence. Throughout the "all mitigating evidence" cases, this Court has never waived from *Jurek*'s holding that such a system is permissible.

The requirement of *Woodson* that *all* mitigating evidence be considered was made more explicit by the plurality opinion in *Lockett v. Ohio*, 438 U. S. 586, 604 (1978). The keystone of the *Lockett* holding was the requirement "for a greater degree of reliability." *Ibid.* Reliability requires that the sentencer have all of the relevant information, see *id.*, at 605, but it does *not* require that the sentencer have unlimited discretion.

The *Lockett* plurality rule was raised to majority status in *Eddings v. Oklahoma*, 455 U. S. 104 (1982), where the Court again emphasized the basis of the rule as one promoting reliability in sentencing. "[T]he rule in *Lockett* recognizes that a consistency produced by *ignoring* individual differences is a false consistency." *Id.*, at 112 (*italics added*). Justice O'Connor sounded a similar note in her concurrence, stating that the purpose of the rule is to "guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Id.*, at 118. The *Lockett-Eddings* rule is an application of the maxim that the equal treatment of unequals is itself an inequality. Thus understood, it is consistent with the equality principle of *Furman*.

In *California v. Brown*, 479 U. S. 538 (1987), this Court addressed a limitation on jury discretion in the context of the *Lockett-Eddings* rule. In that case the “jury was told not to be swayed by ‘mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling.’” *Id.*, at 542. There appears to be no disagreement that the State can legitimately instruct jurors “that conjecture, passion, prejudice, public opinion, or public feeling should [not] properly play any role in the jury’s sentencing determination, even if such factors might weigh in the defendant’s favor.” *Ibid.*; see *id.*, at 549 (Brennan, J., dissenting). The crux of the disagreement between the majority and Justice Brennan’s dissent is whether the jurors understood that they could consider the sympathetic evidence. See *id.*, at 550, 553-55 (dissent).

In the view of at least seven members of the *Brown* Court, then, it would have been perfectly proper to instruct the jury not to make a decision based on these extraneous factors provided that the jury is clearly instructed that sympathy based on the mitigating evidence is proper.⁵

The upshot of *Brown*, then, is that a State *may* impose some limits on the authority of the sentencer to opt for life instead of death, provided that it does not do so in such a way as to preclude consideration of mitigating evidence. Such limits are perfectly consistent with the underlying purpose of *Woodson-Lockett-Eddings* to further the evenhandedness and reliability of capital sentencing. *Brown*, 479 U. S., at 543. Such limits are perfectly consistent with the requirement that “the sentence imposed at the penalty phase should reflect a reasoned *moral* response to the defendant’s background, character,

5. We say “at least seven” because Justice Blackmun’s opinion, joined by Justice Marshall, might seem on its face to imply that sentencer’s discretion need be neither rational nor moral. *Id.*, at 561. From his other opinions, though, it appears that he does not really mean that a life sentence based on racial prejudice against the victim would be proper. See *McCleskey v. Kemp*, 481 U. S. 279, 346-47 (Blackmun, J., dissenting).

and crime rather than mere sympathy or emotion.” *Id.*, at 545 (O’Connor, J., concurring) (*italics in original*).⁶

D. *Franklin and Penry*.

The distinction between consideration of all mitigating evidence and unlimited discretion to grant a life sentence has finally been brought into sharp focus by a pair of Texas cases in the last two terms: *Franklin v. Lynaugh*, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) and *Penry v. Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

The Texas statute in these two cases limits the sentencer’s discretion to grant a life sentence to a far greater degree than the California statute in the present case. Yet the outcome in both cases turned solely on whether the promise relied on in *Jurek* had been kept. “*Jurek* [rested] fundamentally on the express assurance that the special issues would permit the jury to fully consider all the mitigating evidence a defendant introduced that was relevant to the defendant’s background, character, and to the circumstances of the offense.” *Penry*, 109 S. Ct., at 2948, L. Ed. 2d, at 279-80.

In *Franklin* the defendant made an argument strikingly similar to the defense argument in this case. He contended that the jury had to be instructed “that any evidence considered by them to mitigate against the death penalty should be taken into account in answering the special issues, and could *alone* be enough to return a negative answer to either one or both of the questions submitted to them — even if the jury otherwise believed that ‘yes’ answers to the Special Issues were warranted.” *Franklin*, 108 S. Ct., at 2325, 101 L. Ed. 2d, at 163.

The plurality emphatically rejected this argument. *Id.*, at 2330-32, L. Ed. 2d, at 169-71. Indeed, the plurality’s language is so strong that

6. Counsel for defendant prefers to omit the “rather” clause when quoting this passage. See Petitioner’s Brief at 33, 43.

if this Court adheres to that view then the present question is a foregone conclusion. We will therefore limit this discussion to the *Franklin* concurrence and the *Penry* majority opinion.

The keystone of both of these opinions is "the principle underlying *Lockett*, *Eddings* and *Hitchcock* . . . that punishment should be directly related to the personal culpability of the defendant." *Franklin*, 108 S. Ct., at 2332, 101 L. Ed. 2d, at 172; *Penry*, 109 S. Ct., at 2947; 106 L. Ed. 2d, at 278. Not whim, not caprice, not prejudice, not "untethered sympathy," see *California v. Brown*, 479 U. S. 538, 544 (1987) (O'Connor, J., concurring), not the random chance of getting a "soft" jury, just the personal culpability of the defendant.

Penry differed from *Franklin* only in that the "express assurance" upon which *Jurek* had been based was not kept. While *Franklin*'s only mitigating evidence (good conduct in prison) was considered under the question of future dangerousness, 108 S. Ct., at 2333, 101 L. Ed. 2d, at 173 (concurrence), *Penry*'s evidence of mental retardation had compelling mitigating force which was not considered under any of the three questions. 109 S. Ct., at 2950, 106 L. Ed. 2d, at 283. Given that the jury in the present case understood its determination of mitigating factors to include consideration of *all* of defendant's evidence,⁷ the *Penry* problem is absent. Defendant's argument is therefore reduced to the one which was explicitly rejected by the *Franklin* plurality and necessarily, though not as explicitly, rejected by the concurrence as well.

Like all Texas juries, *Franklin*'s was asked whether there is a probability that the defendant would commit acts of violence that would constitute a continuing threat to society. It is quite possible that a juror with a high personal threshold for when a death sentence is appropriate would answer that question "yes" but still not believe that the probability was high *enough* that he personally believed that death was warranted. Cf. Petitioner's Brief 32-33. *Franklin* asked for

7. See p. 2, *supra*.

instructions addressed to such a juror, 108 S. Ct., at 2325, n. 4, 101 L. Ed. 2d, at 163, and this Court upheld the refusal of those instructions.

The *Franklin* concurrence disagreed with the plurality only to the extent that it "suggest[ed] that a State may constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence," 108 S. Ct., at 2332, 101 L. Ed. 2d, at 172, a disagreement which formed the basis of *Penry*. The basic rule of *Franklin* and *Jurek* therefore survives *Penry*. A state may constitutionally base a death sentence upon the jury's response to a specific question so long as that question permits consideration of all mitigating evidence. That question is *not* required to include the jurors' *personal* opinion of appropriateness. The state may base *its* policy of appropriateness on the answer to the question.

In each of the cases reversing a death sentence under *Woodson*, the reason has been preclusion of the introduction or consideration of mitigating evidence. See note 3, *supra*. This Court has never reversed a sentence because of channeling of the sentencer's discretion under a procedure which permitted full consideration of all the evidence proffered by the defendant, while *Jurek* and *Franklin* upheld more extensive limitations than the one presented in this case. If the Texas procedure of asking only about deliberateness and future dangerousness⁸ passes muster, then surely the far broader question of whether aggravating circumstances outweigh the mitigating does also. In an area of the law which cries out for stability, see *Lockett v. Ohio*, 438 U. S. 586, 602 (1978) (plurality), the choice is between following precedent or overruling it. We will demonstrate in the following parts that following *Jurek* is good policy as well as good law.

8. The third question, response to provocation, appears to be rarely presented in capital cases.

II. The threshold determination that the aggravating factors suffice if they are not outweighed may be made by statute.

Defendant argues that the California system precludes the jury from determining that the aggravating circumstances are insufficient to warrant a death sentence even if there are no mitigating factors at all, quoting Justice Stevens's concurrence in *Barclay v. Florida*, 463 U. S. 939, 964 (1983). Petitioner's Brief at 32. The quote is taken out of context; Justice Stevens was merely describing a feature of the Florida system, not holding that this feature was constitutionally mandated.⁹ Nevertheless, Justice Stevens's analysis of the Florida system helps put the present question in perspective and is worth reviewing in detail.

According to this analysis, the path to a capital sentence in Florida goes through three stages. First, at least one statutory aggravating circumstance is found. *Id.*, at 962. Second, the *statutory* mitigating circumstances are found to be insufficient to outweigh the aggravating circumstances. *Id.*, at 963. Then,

"since more information has already been taken into account in crossing the threshold [than in Georgia] the third-stage determination is more circumscribed—whether, even though the first two criteria have been met, it is nevertheless not appropriate to impose the death penalty. Cases reaching this conclusion tend to fall into either or both of two general categories: (1) those in which statutory aggravating circumstances exist, and arguably outweigh statutory mitigating circumstances, but they are insufficiently weighty to support the ultimate sentence; and (2) those in which, even though *statutory* mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment." *Id.*, at 964 (footnotes omitted).

9. He indicated that this feature "helps to fulfill one of the constitutionally required functions of a death penalty scheme." *Id.*, at 964, n. 7. That is far different from holding that it is required.

Stated another way, the system described above could be considered as asking four questions: (1) Is there a statutory aggravating circumstance? (2) Do statutory aggravating circumstances outweigh the statutory mitigating circumstances? (3) Are the statutory aggravating circumstances sufficiently weighty to support the ultimate sentence? (4) Do the total aggravating circumstances outweigh the total (statutory and nonstatutory) mitigating circumstances? A death sentence may properly be rendered upon affirmative answers to all four questions. The fact that "the third stage determination is more circumscribed," than the absolute discretion in Georgia does not render the procedure constitutionally infirm.

A state wishing to base its capital sentencing on the same criteria is not required to follow the same order. If the state does not distinguish between statutory and nonstatutory mitigating circumstances and does not allow nonstatutory aggravating circumstances, then the second and fourth questions are identical and can be combined. Similarly, the first and third questions can be combined by identifying in advance a subset of aggravating circumstances which society deems "sufficiently weighty" and restricting the threshold inquiry to only those circumstances.

Restructured in this way, the sentencing questions would be: (1) Is there at least one aggravating circumstance which is sufficiently weighty that society deems it to justify a death sentence if not outweighed by mitigating circumstances? (2) Considering (a) *all* the evidence that defendant proffers as mitigating, (b) the aggravating circumstance(s) previously identified, and (c) the other "make weight" aggravating circumstances not included in the first list, do the total aggravating circumstances outweigh the total mitigating circumstances? These are the questions presented to the jury as the dissent below understood them. See *People v. Boyde*, 46 Cal. 3d 212, 259, 758 P. 2d 25 (1988) (Arguelles, J.). Even if the dissent is correct,¹⁰

10. We do not concede the question of whether the majority's or dissent's interpretation was correct. That point has been fully briefed by the Attorney General.

there is no federal error. The system described above is constitutional.

Unlike most states, California has *two* sets of aggravating circumstances. The first list is called the "special circumstances" and for the actual killer they are the ones enumerated in California Penal Code section 190.2, subdivisions (a)(1) through (a)(19).¹¹ This list is not actually as long as it seems, because many of the circumstances are variations on others. Boiled down to its essence, the list consists of (1) murder of public officials in the course of their duties;¹² (2) murder to escape prosecution or punishment for an earlier crime;¹³ (3) committing murder more than once;¹⁴ (4) murder by particularly heinous means;¹⁵ (5) murder for particularly heinous motives;¹⁶ and (6) murder in the course of a violent or dangerous felony.¹⁷

Once the threshold for death-eligibility has been crossed, the factors weighing on the side of a death sentence are taken from Penal Code section 190.3. Added to the "special" circumstances are any other circumstances of the crime, *id.*, subd. (a), prior violent or forcible criminal activity, *id.*, subd. (b), and any prior felony conviction, *id.*, subd. (c). While the list of added circumstances is shorter, it consists of items which are far more common. Capital trials of defendants

11. Accomplice liability is generally governed by subdivision (b), requiring a specific intent to kill. See *People v. Anderson*, 43 Cal. 3d 1104, 1142, 742 P. 2d 1306 (1987).

12. Paragraphs 7, 8, 9, 11, 12 and 13.

13. Paragraphs 5 (escape) and 10 (killing a witness).

14. Paragraphs 2 (prior conviction) and 3 (multiple murder).

15. Paragraphs 4 and 6 (explosives), 15 (lying in wait), 19 (poison), and 14 and 18 (torture). For the equivalence of 14 and 18, see *People v. Superior Court (Engert)*, 31 Cal. 3d 797, 802, n. 2, 647 P. 2d 76 (1982).

16. Paragraphs 16 ("hate crimes") and 1 (financial gain).

17. Paragraph 17.

without prior records of felonious, violent or forcible crime are now the exception rather than the rule. Two-thirds of death-sentenced inmates now have prior felony convictions. U. S. Bureau of Justice Statistics, *Capital Punishment* 1987, 1.

The separation of the "special circumstances" from the others identifies those circumstances which are sufficiently weighty to justify a death sentence in the absence of any mitigating circumstances. For example, the separation distinguishes the especially compelling aggravating circumstance of prior conviction of *murder*, Cal. Penal Code § 190.2 (a) (2), from the "make weight" circumstance of prior conviction of *any* felony, *id.*, § 190.3 (c). The only difference between this model and the one described by Justice Stevens is that the separation is made by statute rather than by the sentencer. Nothing in this Court's precedents forbids such a structuring of the system.

Sumner v. Shuman, 483 U. S. 66 (1987), provides an informative contrast. Shuman was sentenced under a mandatory sentencing statute which provided, in effect, that a given aggravating circumstance (murder by a life prisoner) was given "a weight that is deemed to outweigh any possible combination of mitigating circumstances." *Id.*, at 81 (italics added).¹⁸

The statute was held unconstitutional under *Lockett* because it precluded the sentencer's consideration of mitigating circumstances. Most importantly, the statute precluded consideration of minor accomplice status. *Ibid.* The Court noted that the mitigating factors in Nevada's present statute, which are virtually a carbon copy of California's mitigating factors, could be applicable. *Id.*, at 82.

In contrast, the system involved here *never* requires a sentencer to give any aggravating factor a weight that necessarily outweighs any

18. Significantly, the *Shuman* court uses this "outweigh" language interchangeably with the "appropriate sentence" language.

mitigating factor. The assignment of weights is always within the sentencer's discretion. *People v. Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440 (1985), reversed on other grounds sub. nom. *California v. Brown*, *supra*. The *Woodson-Lockett-Eddings* problem is absent. Defendant is *not* treated as a member "of a faceless, undifferentiated mass." Cf. *Woodson*, *supra*, 428 U. S., at 304. He can present *all* his mitigating evidence, cf. *Lockett*, *supra*, 438 U. S., at 604, and the sentencer is *required* to listen, cf. *Eddings v. Oklahoma*, 455 U. S. 104, 115, n. 10 (1982).

Defendant's "absolute weight" argument has no support in any of this Court's holdings. California has done exactly what Justice Brennan insisted that it do in *McGautha*. It has expressed its penological policy on capital punishment. See *McGautha v. California*, 402 U. S. 183, 285-86 (Brennan, J., dissenting). Defendant simply disagrees with the policy.

III. Individualized sentencing should be based on the defendant, not the jurors.

Defendant's final argument stands *Furman v. Georgia* on its head. He claims to be constitutionally entitled to the unguided discretion of the jury to impose a sentence based on nothing more than their personal opinions. See Petitioner's Brief at 42 (criticism of prosecutor's argument that "this is not a personal decision.") While the Constitution may permit such unlimited discretion in a state sentencing system, it has never yet been held to require it.

This Court has said many times that sentencing should be individualized. See, e.g., *Sumner v. Shuman*, 483 U. S. 66, 75 (1987). The "individual" referred to is the defendant, not the juror. The whole point of this massive, complex body of law is that "punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 109 S. Ct. 2934, 2947, 106 L. Ed. 2d 256, 278 (1989). If two defendants are guilty of the same crime under the same circumstances and with the same aggravating and mitigating factors, then they should receive the same punishment. If one re-

ceives a life sentence because his jurors had a different personal threshold than the jurors in the other case, the direct relation of punishment to culpability has not been achieved.

Perfect proportionality is, of course, unachievable. As with any discretionary evaluation system, the cases will inevitably sort themselves out into a low range where the death penalty is rarely applied, a high range where it is consistently applied, and a midrange where the elements of jury variation, prejudice and other improper factors may make the difference. See *McCleskey v. Kemp*, 481 U. S. 279, 287, n. 5 (1987).¹⁹

The unachievability of the ideal is no reason not to do the best we can, however. Capital punishment remains, for the time being, an undeniable political reality.²⁰ If this Court is unwilling to *require* the States to channel the sentencer's discretion after the preliminary aggravating circumstance finding has been made, *Zant v. Stephens*, 462 U. S. 862, 912 (1983) (Marshall, J., dissenting), the least it can do is not *prevent* them from doing so.

Defendant's argument is precisely the opposite of the defense argument which was accepted by two Justices of this Court in *Zant v. Stephens*. In response to a certified question, the Georgia Supreme Court explained that the large category of persons guilty of homicide was analogous to a pyramid divided by three planes. The first plane separates murder from lesser homicides. The second plane was the statutory aggravating circumstances which separate death-eligible murderers from others. *Id.*, at 870-71.

19. Prejudice and *McCleskey* are discussed further in part IV, below.

20. The California Supreme Court's attempt at judicial abolition was swiftly overruled by the people. Cal. Const. art. I, § 27; see *Gregg v. Georgia*, 428 U. S. 153, 181 (1976). Popular support is far more than sufficient to do the same on the federal level, if need be. See U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Statistics — 1987*, 165 (85% support death penalty for some or all murderers).

"The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. *There is an absolute discretion in the factfinder to place any given case below the plane and not impose death.*" *Id.*, at 871 (italics added).

Justice Marshall, joined by Justice Brennan, found this system constitutionally deficient. "If this is not a scheme based on 'standard-less jury discretion' [citation], I do not know what is. Today's decision makes an absolute mockery of this Court's precedents concerning capital sentencing procedures." *Id.*, at 910 (dissent). The drafters of California's statute anticipated the *Zant v. Stephens* argument and included the "balancing" language specifically to ward off that attack. See *People v. Boyd*, 38 Cal. 3d 762, 773, n. 5, 700 P. 2d 782 (1985).

While *Zant* held that the Georgia system of absolute discretion in the final stage did not fall below the constitutional minimum, it surely does not follow that this "mockery" is constitutionally required. California stands accused by the defense of the "crime" of doing more than is constitutionally required to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'" *Zant*, 462 U. S., at 909 (dissent) (quoting *Godfrey v. Georgia*, 446 U. S. 420, 428 (1980)).

It might be argued that limiting discretion to impose the death sentence meets the need while still allowing unlimited discretion to spare the defendant. However alluring this argument may be to those who oppose capital punishment generally, that "solution" is a mirage. For a channel to be a channel it must have two banks. A dike does not suffice.

Minimizing the number of death sentences is not and never has been the goal. See *McGautha*, 402 U. S., at 305-306 (Brennan, J., dissenting). The goal is "evenhanded, rational, and consistent imposition of death sentences under law." *Jurek v. Texas*, 428 U. S. 262, 276 (1976) (italics added). The goal is to directly relate punishment to culpability. *Penry*, 109 S. Ct., at 2947, 106 L. Ed. 2d, at 278.

To come as close as possible to achieving these goals, we must establish a state policy as to what kind of cases warrant capital punishment and instruct the jurors to carry out that policy. See *McGautha*, 402 U. S. at 305 (Brennan, J., dissenting). The fact that the determination cannot be made mechanical is no reason not to state a policy. *Id.*, at 285-86. The fact that discretion is inevitably required is no reason not to channel it. *Id.*, at 285.

If the people of California establish as their policy that death is the appropriate sentence for all cases in which at least one "special" circumstance is present and in which the aggravating factors outweigh the mitigating, nothing in this Court's jurisprudence requires that the jury be instructed to disregard that policy and follow the personal whims of its members.

IV. Unlimited discretion to grant a life sentence may aggravate the *McCleskey* problem.

Any complete discussion of capital punishment must take into consideration the problem of racial discrimination. There can be little doubt that *Furman v. Georgia*, 408 U. S. 238 (1972) would have been decided differently but for the influence of racism. See *id.*, at 257 (Douglas, J.). Whatever else this Court may do, its first and highest priority should be to avoid making any rule that would even potentially increase the impact of race on sentencing.

In *McCleskey v. Kemp*, 481 U. S. 279 (1987), this Court was confronted with an empirical study of capital sentencing in Georgia which claimed to show that persons who killed white victims were more likely to receive the death penalty than persons who killed black victims under similar circumstances, particularly in the mid-range of cases. *Id.*, at 287, n. 5. A narrowly and bitterly divided Court held that these statistics did not establish an equal protection violation. As with *Zant v. Stephens*, *supra*, however, the fact that the Georgia system is not unconstitutional does not mean that we cannot or should not improve upon it.

Justice Brennan's dissent makes several important points. He notes the importance of lists of aggravating and mitigating factors. *McCleskey*, 481 U. S., at 333. More importantly, he notes the importance of a "standard for balancing them against one another," *ibid.*, precisely the feature of the California statute which defendant attacks. He notes the burden on the State to devise a better system. *Id.*, at 334, n. 9. Clearly, the State can do nothing in this direction if its hands are tied by constitutional rules.

Perhaps most poignantly, Justice Brennan observes that "diminished willingness to render [a death] sentence when blacks are victims reflects a devaluation of the lives of black persons." *Id.*, at 336. Indeed it does, and that is why it is so important to channel discretion and hold that diminished willingness in check. For the essence of the *McCleskey* problem is not that McCleskey did not deserve his sentence but that others equally deserving were spared on an impermissible basis. If the rule that defendant seeks to make in this case would hamper the efforts of states to address this problem, then that rule should not be made.

Amicus California Appellate Project (CAP) has presented the Court with some data from Alameda County.²¹ CAP Brief 27-29. For reasons that are fully explained in the brief of the Attorney General, CAP's claim that definitive conclusions can be drawn from these data is vastly overstated. Obviously this study is nowhere near the sophistication of the Baldus study. Nonetheless, at our request the District Attorney of Alameda County determined the race and ethnic group of the defendants and victims in these cases. These data tentatively support Justice Brennan's hypothesis that the lack of a standard for balancing aggravating against mitigating contributes to the *McCleskey* problem. See *McCleskey*, 481 U. S., at 333 (dissent).

21. CAP's brief gives the impression, perhaps inadvertently that the verdict forms described there were the product of a cooperative effort of the bench and bar. Actually, these forms were used over the vehement objection of the District Attorney.

Table 1
Ethnicity of Defendants and Homicide Victims

	Defendant	Victim
Death Verdicts:		
Day	Black	Black*
Freeman	White	White
Hill	Black	Black*
Mason	White	White*
Mitcham	Black	White
Thomas	Black	White*
Wash	White	White
LWOP Verdicts:		
Barbosa	Black	White
Calderon	Hispanic	Hispanic
Delgado	Hispanic	Hispanic
Green	Black	White
Jones	Black	Black
Quinnell	White	White
Smith	White	White
Weston	Black	Black

* Multiple homicide victims, all of the same ethnic group.
Two cases also involved a surviving victim; Ethnicity shown is that of the deceased.

Table 1 shows the race or ethnic group of the defendant and the homicide victim(s) in the fifteen cases designated by CAP as those where the jury found the aggravating outweighed the mitigating. See CAP Brief, Appendices D and E. Cases with multiple victims are indicated. Table 2 then shows the percentages. Considering all cases, there are slightly fewer death sentences in both minority cases and minority-defendant cases. However, Table 1 shows that death

verdicts were returned in all four of the multiple-murder cases, indicating that juries consider this circumstance powerfully aggravating. Excluding these cases,²² the percentage of death verdicts in minority-victim cases drops to zero, while the percentage of death verdicts in nonminority-victim cases remains near one-half.

Table 2
Percent of Death Sentences

All Cases:			
Minority defendant	40.0%	Minority victim	33.0%
Nonminority defendant	60.0%	Nonminority victim	55.6%
Single-Homicide Cases:			
Minority defendant	14.3%	Minority victim	0.0%
Nonminority defendant	50.0%	Nonminority victim	42.9%

CAP maintains that instructions such as those in Boyde's case would have resulted in eight additional death verdicts. CAP Brief at 28-29. We do not believe that case is proven, but even assuming that result for the sake of argument, an increased number of death sentences is not necessarily an undesirable result. If reduced willingness to render a death sentence in minority-victim cases devalues the lives of minority people, as it most assuredly does,²³ the answer is not to equally devalue the lives of the white victims. The answer is to structure the system and channel discretion so as to achieve justice for the minority victims as well.

22. The Baldus study found that racial problems were more acute when particularly heinous crimes were excluded from the sample. *McCleskey*, 481 U. S., at 287, n. 5.

23. See p. 23, *supra*.

We will not pretend that this limited sample proves our hypothesis. It does, however, indicate a significant *possibility* that an instruction in the bare words of the statute produces less discriminatory results than the instruction now being used. If the states are to devise better, less discriminatory systems, they must not be strapped into the constitutional straitjacket which the defendant proposes.

Conclusion

The judgment of the Supreme Court of California should be affirmed.

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Respectfully submitted,

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